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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 732

PAUL W. BRAMLETT and JAMES J. O'DONNELL, Employees of the Panama Canal Company, and PAULINE F. BLANEY, ALBERT F. HANSON, and LYDIA M. MYERS, Employees of the Canal Zone Government, *Petitioners*

v.

BRIGADIER GENERAL WALTER P. LEBER, Governor of the Canal Zone and President, Panama Canal Company, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul W. Bramlett, and James J. O'Donnell, employees of the Panama Canal Company and Pauline F. Blaney, Albert F. Hanson, and Lydia M. Myers, employees of the Canal Zone Government, all being

appellees in the Court below,[1] through their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 25, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 104-123) (App., pp. 14a-30a) is not yet reported. The opinion of the United States District Court for the District of the Canal Zone, Balboa Division (R. 51-76), as amended (R. 77-78) (App., pp. 31a-53a), is reported at 246 F. Supp. 998.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on July 25, 1967 (R. p. 124) (App., p. 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the conclusion of the Court below that the Secretary of the Army, who was the author of the disputed Regulations reducing the amount of the tropical salary differential payable to employees of the Panama Canal Company and Canal Zone Government, and who could not be served with process, was

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[1] In conformity with the requirements of the Court below, the appeal designated the Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, as the principal appellee. Since its claim was dismissed by the United States District Court for the District of the Canal Zone, and no appeal was taken therefrom, the caption of the case has been changed in this proceeding to designate the actual petitioners.

an indispensable party to the original proceeding, even though his subordinate, the Governor of the Canal Zone and President of the Panama Canal Company was a party, is in conflict with the applicable decisions of this Court holding that the presence of a superior officer can be dispensed with when the relief desired can be enforced against a subordinate official who is before the Court?

2. Whether the United States actually was an indispensable party to the original proceeding because the relief sought by petitioners purportedly would expend itself on public appropriations, as concluded by the Court below, when in fact the costs of operating the Panama Canal Company and the Canal Zone Government are required by the provisions of 2 C.Z.C. §§ 61(a), 62(f) and (g), 70, and 72 to be derived from the annual operating revenues of the Company?

3. Whether under the provisions of 2 C.Z.C. § 146 it is mandatory that each United States citizen employee of the Canal Zone Government and the Panama Canal Company be paid a tropical salary differential of 25 per cent of the aggregate amount of the rate of basic compensation and the tax allowance, and not less than 25 per cent, or is the Secretary of the Army empowered by the provisions of 2 C.Z.C. §§ 142(a)(3) and 155 to promulgate Regulations fixing the rate of tropical differential at any rate which does not exceed 25 per cent of the aggregate amount of an employee's rate of basic compensation and tax allowance?

4. Whether, assuming *arguendo* that the Secretary of the Army can promulgate Regulations fixing the rate of tropical differential at any rate not in excess of 25 per cent of the aggregate amount of the rate of basic compensation and the tax allowance, the provi-

sions of 2 C.Z.C. §§ 141 and 146 which specify that the tropical differential *shall be paid to each employee* who is a citizen of the United States, and who holds a position with the Company—Government, precludes the Secretary from issuing Regulations prohibiting the payment in entirety of the tropical differential to married female employees and to dependent non-head of household employees, except those meeting special qualifications?

STATUTES INVOLVED

The petitioners' claims are predicated upon the following provisions of Title 2 of the Canal Zone Code, as codified in Volume 76A of the United States Statutes At Large (1962), and are set forth in full in Part I of the Appendix annexed hereto (App., pp. 1a-9a):

2 C.Z.C. § 31(1). *Canal Zone Government; administration and functions generally.* 76A Stat. 7. (App., p. 1a.)

2 C. Z. C. § 32. *Appointment and term of Governor.* 76A Stat. 7. (App., p. 1a.)

2 C.Z.C. § 33. *General powers and duties of Governor.* 76A Stat. 7. (App., pp. 1a-2a.)

2 C.Z.C. § 61(a). *Continuation, purposes, offices and residence of the Company.* 76A Stat. 8. (App., p. 2a.)

2 C.Z.C. § 62(b), (e), (f), and (g). *Investment of the United States.* 76A Stat. 8. (App., pp. 2a-4a.)

2 C.Z.C. § 63. *Board of Directors; allowances; quorum; meetings.* 76A Stat. 8. (App., p. 4a.)

2 C.Z.C. § 64. *President of the Company.* 76A Stat. 11. (App., p. 4a.)

2 C.Z.C. § 66(a)(1) and (5). *Specific powers of Company.* 76A Stat. 11. (App., pp. 4a-5a.)

2. C.Z.C. § 70. *Payment of excess funds into Treasury.* 76A Stat. 13. (App., p. 5a.)

2. C.Z.C. § 72. *Appropriations to cover losses.* 76A Stat. 13. (App., pp. 5a-6a.)

2 C.Z.C. § 101(a) and (b). *Appointment and compensation of Government employees.* 76A Stat. 14. (App., p. 6a.)

2 C.Z.C. § 121(a). *Appointment and compensation; duties; delegation of powers; bonds.* 76A Stat. 15. (App., pp. 6a-7a.)

2 C.Z.C. § 141. *Definitions.* 76A Stat. 16. (App., p. 7a.)

2 C.Z.C. § 142. *General rules governing wage and employment practices.* 76A Stat. 16. (App., pp. 7a-8a.)

2 C.Z.C. § 144. *Compensation.* 76A Stat. 17. (App., pp. 8a-9a.)

2. C.Z.C. § 146. *Additional allowance and differential.* 76A Stat. 17. (App., p. 9a.)

2. C.Z.C. § 155. *Administration by President; regulations; delegation of authority.* 76A Stat. 19. (App., p. 9a.)

REGULATIONS INVOLVED

The Regulations of the Secretary of the Army which effected the permanent reduction in the rate of the tropical differential, and which prohibited the payment of the tropical differential to married women employees of the Panama Canal Company and Canal Zone Government who are citizens of the United States, and to dependent non-head of household employees, except under special circumstances not herein pertinent, were promulgated on October 10, 1964 in 29 F.R. 14024, and by 31 F.R. 12202, 12344, were transferred to 35 C.F.R.(1967 Rev.) § 253.135, having formerly been found in 5 C.F.R.(1964 Rev., 1966 Supp.) § 1204.12. (App., pp. 10a-12a.)

EXECUTIVE ORDER INVOLVED

The authority under which the Secretary of the Army purported to act in issuing the disputed Regulations of October 10, 1964, *supra,* is contained in Executive Order 11171 of August 18, 1964, 29 F.R. 11897, now found in 3 C.F.R.(1964 Supp.) pp. 174-176. (App., pp. 12a-13a.)

STATEMENT

Petitioners are 5 United States citizens who, for many years, have been employed by the Canal Zone Government and the Panama Canal Company in manual and non-manual categories. Two of the petitioners, Pauline Blaney, and Lydia Myers, are married women whose spouses are also employed by the Canal Zone Government—Panama Canal Company. The petitioners collectively represent a cross-section of the civilian workforce of more than 3,500 United States citizens who hold positions with the Canal Zone Government—Panama Canal Company. These petitioners, together with the Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, an employee-labor organization composed of United States citizen employees holding positions with the Government—Company, instituted proceedings in the District Court on November 12, 1964 against the Governor of the Canal Zone who, pursuant to the provisions of 2 C.Z.C. § 64, also serves *ex officio* as president of the Panama Canal Company, and against the Secretary of the Army, who, pursuant to the provisions of 2 C.Z.C. §§ 31 and 62, is the official named by the President of the United States in Executive Order 10595 of February 7, 1955, 3 C.F.R.(1954-1958 Comp.) p. 242, and Executive Order 11171, *supra,* to supervise the functions of the Canal Zone Government, to act as the sole stockholder of the Company, and to coordinate their

wages and employment practices, for a judgment declaring certain Regulations promulgated by the Secretary of the Army affecting the payment of the tropical differential in salary to be in conflict with various provisions of the Canal Zone Code, principally 2 C.Z.C. §§ 141 and 146, and therefore to be invalid, and for a permanent injunction against their application and enforcement by said officials (R. pp. 1-19). Jurisdiction of the District Court was invoked under the provisions of 3 C.Z.C. § 141, 76A Stat. 56, and 5 C.Z.C. §§ 321-322 and 1501, 76A Stat. 298, 346.

The disputed Regulations, which were promulgated on October 10, 1964, *supra* (App., pp. 10a-12a), accomplished the following pertinent results:

> 1. Subject to the provisions of a savings clause which protected existing employees against any immediate loss of compensation, reduced the amount of the tropical differential from 25 per cent to 15 per cent of the aggregate amount of the established basic compensation and the tax allowance, and provided for its further review and adjustment periodically; and
>
> 2. Eliminated the payment of the tropical differential to (a) married women whose husbands also resided in the Canal Zone or in the Republic of Panama, unless legally separated, or unless said husbands were dependent upon their wives for 51 per cent of their support, and (b) dependent non-head of household employees.

Since the dates when these Regulations were effectuated, each of the petitioners has sustained, and is continuing to sustain a loss of compensation.[2]

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[2] These Regulations, and their interim predecessors of July 29, 1964, 29 F.R. 10490, were effectuated retroactively to July 5, 1964 for non-manual category employees, and to July 20, 1964 for manual category employees (R. pp. 7-10).

As the petitioners were unable to obtain service upon the Secretary of the Army, the respondent filed a Motion to Dismiss the Complaint or For Summary Judgment on the jurisdictional grounds that (1) the Secretary was an indispensable party; (2) this was in reality an unconsented suit against the United States; and (3) the Union had no standing to maintain the action, and on the substantive ground that the Regulations were consistent in all respects with the applicable statutes, and therefore valid (R. pp. 20-48). However, petitioners' Cross-Motion for Declaratory Judgment (R. pp. 48-50) was sustained by the District Court on November 9, 1965, and amended on November 10, 1965, *Canal Zone Central Labor Union, et al.* v. *Fleming,* 246 F. Supp. 998 (App., pp. 32a-53a), on the following major grounds:

1. The Secretary of the Army was not an indispensable party to the action because the injunctive relief sought by the petitioners could be accomplished by the issuance of a permanent injunction against the Governor-President.

2. The petitioners' cause of action, as it pertained to the Governor, was not an unconsented suit against the United States.

3. The only reasonable interpretation that could be placed upon 2 C.Z.C. § 146 was that its provisions made mandatory the payment of a tropical differential of 25 per cent, and not less than 25 per cent, to United States citizen employees, and the Secretary of the Army did not possess discretionary authority to alter or reduce this percentage.

4. Under the provisions of 2 C.Z.C. §§ 141 and 146, each United States citizen employee was entitled to be paid the 25 per cent tropical differential regardless of sex, marital status, or dependency status.

5. The Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, did not possess standing to sue.

On December 6, 1965 the Governor, pursuant to the provisions of 28 U.S.C. § 1294(2), noted an appeal to the United States Court of Appeals for the Fifth Circuit from an order permanently enjoining him from enforcing the Regulations issued by the Secretary of the Army (R. pp. 85-86). This order was stayed by the District Court on December 10, 1965 pending final action on this appeal (App., pp. 58a-59a). A cross-appeal was not filed by the Canal Zone Central Labor Union & Metal Trades Council, AFL-CIO, from the dismissal of its claim.

On July 25, 1967 the Court below concluded the judgment of the District Court should be reversed, and the action dismissed, for the following three reasons (App., pp. 14a-30a):

(1) The Secretary of the Army was an indispensable party to the original proceeding because specific action by him was deemed necessary to reinstate the payment of the full 25 per cent tropical differential, and thereby effectuate the relief sought.

(2) Since the relief sought purportedly would expend itself on public appropriations, the United States was deemed to be an indispensable party and the District Court for the District of the Canal Zone was not a court in which the Government had consented to be sued.

(3) Reaching the merits, the Regulations issued by the Secretary of the Army were construed to be valid and not in conflict with the controlling

sections of the Canal Zone Code wherein they reduced the rate of the tropical differential from 25 to 15 per cent, and prohibited the payment of the tropical differential in entirety to married women whose spouses resided in the Canal Zone or the Republic of Panama and were self supporting, and to dependent non-head of household employees.

REASONS FOR GRANTING WRIT

1. The majority decision of the Court below (one Judge concurring in the result, but dissenting as to this issue) that the Secretary of the Army, who authored the disputed Regulations reducing the amount of the tropical differential payable to employees of the Panama Canal Company and Canal Zone Government, and who could not be served with process in the original proceeding, was an indispensable party, even though his subordinate, the Governor of the Canal Zone and President of the Panama Canal Company, 2 C.Z.C. §§ 31(1) and 64 (App., pp. 1a, 4a), was a party, is in direct conflict with the applicable holdings of this Court that the presence of a superior officer is unnecessary when, as here, the relief desired can be enforced against a subordinate official who is before the Court. *Ceballos* v. *Shaughnessy,* 352 U.S. 599, 603-604; *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, 52-53; *Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior* v. *Grimes Packing Company, et al.,* 337 U.S. 86, 96-97; *Williams* v. *Fanning,* 332 U.S. 490, 493-494. These cases make it clear that it is only when the decree granting the relief sought will require the superior officer to take action, either by exercising directly a power conferred upon him, or by having a subordinate exercise it for him, that the superior's presence is indispensable.

Although the Court below was of the opinion that the Secretary of the Army would have to take the specific action of authorizing the payment of any former rate of differential to petitioners in order to vindicate their rights, this reasoning is specious as it would be completely unnecessary for the Secretary to perform a single act, either directly or through a subordinate, to effectuate the relief sought by the petitioners. If the Secretary's disputed Regulations are declared to be invalid, and if a permanent injunction enjoining the Governor of the Canal Zone-President of the Panama Canal Company from enforcing them is issued, all action necessary under existing law to restore the petitioners to their former *status quo* can be taken by respondent. Prior to the issuance of the Secretary's Regulations in 1964, the payment of the 25 per cent tropical differential to petitioners was predicated solely upon the exercise by respondent of the power conferred upon him in 2 C.Z.C. §§ 101 and 121 (App., pp. 6a-7a) to prescribe the compensation of employees of the Government—Company, and to include therein a tropical differential of not more than 25 per cent of their basic compensation. Since this power to fix and pay the tropical differential had been vested in and exercised exclusively by the Governor-President during the 52-year period between the grant of such authority to him in § 4 of the Act of August 24, 1912, ch. 390, 37 Stat. 560, 561, and the issuance of the Secretary's Regulations, and since Congress has not seen fit to this day to revoke the grant of this power, it is patent that the exercise of this power by respondent is *all* that is required to effectuate the desired relief.

This Court is therefore urged to undertake a realistic review of the governmental organization of the

Government—Company dual entity. Clarification of the division of power and of the delegation of power between the Secretary of the Army and the Governor-President is vitally needed.

While the Court below recognized that this Court has stressed the need for employing practical considerations in determining when a superior officer is an indispensable party, it failed to utilize such considerations in reaching its decision. At all times the interests of the Secretary of the Army could have been, and were in fact, ably defended by the United States Attorney for the Canal Zone, and by attorneys from the Department of Justice. The forum before which the issues were originally argued was an especially appropriate one because of its intimate knowledge of the laws of the Canal Zone and of the composition of the Government—Company structure. This forum was in a position to decide the issues promptly, and was reasonably convenient for all of the parties. Hence, the action of the Court below in permitting the absence of the Secretary of the Army as a party to the proceeding, which absence was attributable solely to the Secretary's desire to capitalize upon the difficulties encountered in serving him with process, to defeat a determination of the real issues on their merits at the point of their origin disregards all of the practical considerations involved, and necessitates the exercise by this Court of its powers of supervision.

2. The Court below erred in concluding that the original action was actually an unconsented suit against the United States in a court in which the Government had not agreed to be sued. Although the Court stated that the United States was an indispensable party because, "There is no dispute that the direct effect of

the relief sought by appellees would expend itself on public appropriations" (R. p. 113), this conclusion is incorrect. Petitioners have specifically taken issue with this argument at all stages of the proceeding in view of the provisions of 2 C.Z.C. § 61 *et seq.* (App., pp. 2a-6a) that require the Panama Canal Company to be financially self-sustaining, and to defray from its annual operating income the net costs of operation of the Canal Zone Government.

Under the provisions of 2 C.Z.C. § 66 (App., pp. 4a-5a), the Panama Canal Company is authorized to maintain and operate the Panama Canal, and to make or furnish sales and services incident thereto to users, to Government employees and agencies, and to others. From the proceeds thus derived the Company is authorized by 2 C.Z.C. § 70 (App., p. 5a) to retain the amount necessary for its annual working capital requirements and for plant replacement and expansion, and to pay the surplus into the Treasury annually. The annual working capital requirements include (1) under 2 C.Z.C. § 62(e) (App., p. 2a), the payment of interest on the net direct investment of the United States therein; (2) under 2 C.Z.C. § 62(f) and (g) (App., pp. 3a-4a), the net costs of operation of the Canal Zone Government, which are "deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole; and, under 2 C.Z.C. § 72 (App., pp. 5a-6a), amounts required to repay any appropriations made by Congress to cover losses incurred in the Company's authorized activities. Any surplus must, under 2 C.Z.C. § 62(g) (App., pp. 3a-4a), be applied to defray annual annuity payments due the Republic of Panama under existing treaties, and, under 2 C.Z.C. § 62(f) (App., pp. 2a-3a), to repay amounts of directly contributed capital.

Under these circumstances there is no conceivable way in which the relief sought by petitioners could expend itself on public appropriations. Rather, by law, it must expend itself directly against the dual entity of the Panama Canal Company—Canal Zone Government which in turn must ultimately charge the amount of the differential payments, whether fixed at 15 per cent or 25 per cent, against the shippers who use the Canal and against the others who must avail themselves of its services, including the petitioners and all other employees who must utilize the facilities and services available only from the monopolistic enterprises conducted by the Company for profit. Since the respondent is the responsible executive officer of both the Company and Government, and as such is authorized by 2 C.Z.C. §§ 101, 121 and 146 (App., pp. 6a-7a, 9a) to employ the petitioners and prescribe their compensation, including the rate of tropical differential that they may receive, his presence alone before the Court was all that was necessary for the effective grant of the requested relief, and the presence of the United States was totally unnecessary. Hence, this Court should exercise its reviewing powers.

3. As noted previously, during the 52-year period that elapsed between the passage of § 4 of the Act of August 24, 1912, *supra,* and the promulgation of the challenged Regulations by the Secretary of the Army on October 10, 1964, the employees of the Canal Zone Government—Panama Canal Company and their predecessor organizations received, at all times, as an additive to their basic compensation, a tropical differential of 25 per cent. Payment of the tropical differential at this rate was deemed mandatory under this statutory language (repeated in Executive Order 1888 of Feb-

ruary 2, 1914) which provided that the compensation of employees "shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States." Thus, in light of this historical background of the tropical differential payments, the conclusion by the Court below that the Secretary's Regulations reducing the rate of the tropical differential from 25 to 15 per cent constituted a valid exercise of the discretionary powers conferred upon him by 2 C.Z.C. §§ 142 and 155 and by Executive Order 11171, *supra* (App., pp. 12a-13a), is erroneous, and in conflict with the numerous holdings of this Court that specify when the terms of earlier legislation (Act of August 24, 1912, *supra*) are carried forward in a later enactment (2 C.Z.C. § 146) without material change, effect should be given to the accepted construction and administrative practice under the earlier statute. *United States* v. *Midland-Ross Corp.*, 381 U.S. 54, 59; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 332; *Posadas* v. *National City Bank*, 296 U.S. 497, 505; *Old Colony Railroad Co.* v. *Commissioner*, 284 U.S. 552, 557; *National Lead Co.* v. *United States*, 252 U.S. 140, 146-147.

While, as noted by the District Court (App., p. 38a) "the words 'in excess of' frequently connote a sum less than but not greater than," such was not the meaning that Congress intended them to have in this instance. Instead, as found by the District Court, the obvious purpose of this language was merely to place a ceiling upon the amount of the tropical differential without conferring discretion upon the Secretary to authorize the payment of less than the full 25 per cent.

Hence, the conclusion by the District Court, which was rejected by the Court below, that the provisions of the opening paragraph of 2 C.Z.C. § 146 and of subparagraph (2) thereof, when read together, are mandatory and require that the amount of the tropical differential paid to United States citizen employees shall be 25 per cent of their basic compensation and the tax allowance, but "not in excess" of that amount, is sound, and its adoption should be carefully considered by this Court (App., p. 39a). Such a construction is far more consistent with the legislative history of § 4 of the Act of August 24, 1912, *supra,* as expressed in the statement of Representative Adamson, 48 Cong. Rec. 6786 (App., p. 25a) than the position adopted by the Court below.

The conclusion of the Court below leaves the Secretary of the Army in possession of delegated powers, the limits of which have not been defined by Congress. Such delegations, which fail to prescribe standards for the guidance of the recipient of the delegated power with sufficient exactness to enable him to understand the extent of his authority, have been repeatedly declared invalid by this Court. *United States* v. *Rock Royal Co-Operative, Inc.,* 307 U.S. 533, 574; *Schechter Corp.* v. *United States,* 295 U.S. 495, 529-530, 541-542; *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 414-415, 418-419, 421, 430; *Hampton & Co.* v. *United States,* 276 U.S. 394, 407-409. Inasmuch as the Secretary is not required to predicate the Regulations upon any criteria established by Congress, or to make any findings in support of his action, this Court should consider and decide whether the proper limits of delegation of authority have been transcended in this instance.

4. Assuming *arguendo* that the Secretary of the Army has properly promulgated the Regulations fixing the rate of the tropical differential at 15 per cent of the aggregate amount of petitioners' basic compensation and tax allowance, petitioners submit that the Court below erred in concluding that the Secretary also possessed the power under 2 C.Z.C. § 142(b)(1) (App., p. 8a) to preclude by regulation the payment of any portion of the tropical differential to married female United States citizen employees and to dependent non-head of household employees, except those meeting special qualifications not pertinent to this case. This conclusion by the Court below that the provisions of § 142(b)(1) are intended to permit the Secretary to exclude *any* United States citizen employee from receiving the tropical differential, is improperly based upon speculation as to the Congressional intent in employing seemingly broad language therein. Such speculation is unwarranted in view of the legislative history of § 142(b)(1) which demonstrates that the language employed was actually intended to be given a very narrow construction.

During the debate on the floor of the House of Representatives of the provisions of the bill that was subsequently enacted and is now codified in § 142(b)(1), the need for clarification of the language permitting the "exclusion of any employee" from any provision of the Act was recognized by Representative Robert W. Hemphill of South Carolina who had served on the Subcommittee of the House Committee on the Post Office and Civil Service which had heard testimony on the several drafts of the bill, and which had reported the final bill to the House of Representatives. The following explanation by Representative Hemphill at 104

Cong. Rec., Part 9, p. 11387, establishes beyond question that the conclusion reached by the Court below was never intended by Congress:

> *Mr. Hemphill.* Mr. Speaker, I have asked for this time only for the purpose of clarifying one section of the bill and one part of the report.
>
> Under section 3 of the bill, item (b-1) on page 7, the President of the United States as administrative authority under the terms of this legislation, is authorized to exclude any employee or position from the act or provision of the act. I would like to read into the RECORD at this point a part of the able report made by the chairman of the subcommittee to the full committee. Page 3 of that report says:
>
> > Section 3 authorizes and directs the head of each department or agency operating in the Canal Zone to conduct the employment and wage practices in accordance with the principles of the memorandum of understanding, the provisions of this bill, and regulations prescribed by or under the authority of the President. Also, it authorizes the President to exclude any employee from this act. *This exclusion is necessary in case of the Governor of the Canal Zone, the Deputy Governor, the President of the Panama Canal, and other similar officials.* [Emphasis added.]
>
> I read that into the RECORD for the purpose of clarification.

In light of this explanation, it is evident that the terms "exclude any employee or position" were not used in an all-inclusive sense which encompassed all employees, but rather were intended to have a very limited and definite meaning that excluded the "rank

and file" employees such as petitioners. *Cf. Cole* v. *Young,* 351 U.S. 536, 548, 551. Hence, the language of § 142(b)(1) should be construed as a very narrow limitation upon the provisions of 2 C.Z.C. § 146 which specify that a tropical differential shall be paid to each employee, *i.e.,* each individual holding a position,[3] who is a citizen of the United States, and should not be permitted to deprive married women and dependent non-heads of households from receiving the full amount thereof. This Court's power of supervision should therefore be invoked to prevent the enforcement of invalid regulatory provisions that are plainly out of harmony with the statutes. *Dixon* v. *United States,* 381 U.S. 68, 74; *Manhattan Co.* v. *United States,* 297 U.S. 129, 134; *Miller* v. *United States,* 294 U.S. 435, 439-440; *Campbell* v. *Galeno Chemical Co.,* 281 U.S. 599, 610.

Unless this Court exercises its powers of review over this issue, the affirmation by the Court below of the action of the Secretary of the Army will result in a continuing flagrant violation of the Government's policy of nondiscrimination and equal employment opportunity as set forth in Ch. 713-3, *Federal Personnel Manual,* issued by the Civil Service Commission pursuit to § 161 of the Revised Statutes, 5 U.S.C. § 22. Section 1-1 of this Chapter states the following General Policy of the Government:

> The policy of the Government that there shall be no discrimination based on such factors as race, religion, political affiliation, physical handicap, sex, and other matters discussed in this chapter has been stated so clearly and unequivocally in

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[3] See the definition of "employee" in 2 C.Z.C. § 141 (App., p. 7a).

> various laws, Executive orders, public statements of the President, rules, and regulations as to leave no room for doubt as to the broad application of the policy. * * * [4]

The decision of the Court below is also in conflict with a decision of the Comptroller General, 26 Comp. Gen. 660, 662, rejecting an earlier attempt by the Secretary of War in 1947 to restrict the payment of a foreign service differential established under § 2 of the Act of July 3, 1930, 46 Stat. 1005, to the head of a family where two or more members of the family lived under the same roof and qualified for the differential. The conclusion of the Comptroller General that the authority of the head of the department to fix salary rates for positions could "not be so exercised as to discriminate against the incumbent of a position so as to pay him at a salary rate less than that fixed for the position solely because of the family status of such incumbent," is sound, and should have been applied by the Court below to preclude the discrimination that now exists against married female employees and non-head of household employees of the Government-Company.

CONCLUSION

Since the questions presented are of general importance to several thousand United States citizen employees of the Canal Zone Government and Panama Canal Company, as well as employees of other federal agencies stationed in the Canal Zone, and since the decision below conflicts with other decisions of this

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[4] See Executive Order 10980, of December 14, 1961, 26 F.R. 12059, 3 C.F.R. (1959-63 Comp.) p. 500.

Honorable Court in several aspects, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

PART I

STATUTES, REGULATIONS AND EXECUTIVE ORDER INVOLVED

Statutes Involved

The Canal Zone Code is codified in Volume 76A of the United States Statutes at Large. In pertinent part, Title 2 of the Code, 76A Stat. 6 *et seq.*, provides:

2 C.Z.C. § 31. *Canal Zone Government; administration and functions generally.*

The Canal Zone Government, an independent agency of the United States, shall:

(1) be administered, under the supervision of the President or such officer of the United States as may be designated by him, by a Governor of the Canal Zone; * * *. 76A Stat. 7.

2 C.Z.C. § 32. *Appointment and term of Governor.*

The President, by and with the advice and consent of the Senate, shall appoint the Governor of the Canal Zone. The Governor shall hold office for a term of four years and until his successor is appointed and has qualified. 76A Stat. 7.

2 C.Z.C. § 33. *General powers and duties of Governor.*

The Governor of the Canal Zone shall:

(1) have official control and jurisdiction over the Canal Zone; and

(2) perform all duties in connection with the civil government of the Canal Zone, which is to be

held, treated and governed as an adjunct of the Canal. 76A Stat. 7.

* * * *

2 C.Z.C. § 61. *Continuation, purposes, offices and residence of the Company.*

(a) For the purposes of maintaining and operating the Panama Canal and of conducting business operations incident thereto and incident to the civil government of the Canal Zone, the Panama Canal Company is continued as a body corporate and as an agency and instrumentality of the United States. 76A Stat. 8.

* * * *

2 C.Z.C. § 62. *Investment of the United States.*

* * * *

(b) The President of the United States or such officer of the United States as he designates, shall be known as the "stockholder", and shall represent the United States in its capacity as owner of the Company.

* * * *

(e) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in it, the Panama Canal Company shall pay interest to the Treasury on the net direct investment of the Government * * *.

(f) The Panama Canal Company shall account for its surplus, as follows:

(1) the total net income from operations from and after 1904 (when the Government acquired control of the Panama Canal Railroad Company), plus the undistributed net income prior to 1904; less

(2) payments to the Treasury as dividends from and after 1904, not applied as offsets to direct capital contributions as described below; and less

(3) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the Panama Canal Company, not reimbursed through specific appropriations by the Congress, and not applied as offsets to direct capital contributions as described below.

The Panama Canal Company may not be required to pay interest to the Treasury on any part of its surplus, as above defined. Repayments to the Treasury as dividends shall be applicable as offsets against directly contributed capital, past or future, in determining the base for the interest payments required by subsection (e) of this section. Extraordinary expenditures and losses, as defined by paragraph (3) of this subsection, to the extent that they are not reimbursed through specific appropriations, shall be considered as repayments to the Treasury analogous to dividends and similarly applicable as offsets against directly contributed capital.

The net costs of operation of the Canal Zone Government, which are deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole, shall not include interest but shall include depreciation and the reimbursement of other Government agencies for expenditures made on behalf of the Canal Zone Government. The payments into the Treasury, referred to in this subsection, shall be made annually to the extent earned, and if not earned shall be made from subsequent earnings unless the Congress otherwise directs.

(g) The Panama Canal Company is further obligated to pay into the Treasury as miscellaneous receipts amounts sufficient to reimburse the Treasury, as nearly as possible, for the:

(1) annuity payments under article XIV of the convention of November 18, 1903, between the United States of America and the Republic of Panama, as modified by article VII of the treaty of March 2, 1936, between those Governments; and

(2) net costs of operation of the agency known as the Canal Zone Government. 76A Stat. 8.

2 C.Z.C. § 63. *Board of Directors; allowances; quorum; meetings.*

(a) A board of directors shall manage the affairs of the Panama Canal Company. The Board shall consist of not less than nine nor more than thirteen members, including:

(1) the Governor, who shall serve as a director, ex officio; and

(2) the stockholder, if he elects to serve as a director. 76A Stat. 10.

2 C.Z.C. § 64. *President of the Company.*

The Governor shall serve, ex officio, as president of the Panama Canal Company. 76A Stat. 11.

* * * *

2 C.Z.C. § 66. *Specific powers of Company.*

(a) Subject to the Government Corporation Control Act (31 U.S.C. sec. 841 et seq.) the Panama Canal Company may:

(1) maintain and operate the Panama Canal;

* * * *

(5) make or furnish sales, services, equipment, supplies, and materials, as contemplated by this chapter, to:

(A) vessels;

(B) agencies of the Government of the United States;

(C) employees of the Government of the United States; and

(D) any other governments, agencies, persons, corporations, or associations eligible to make or receive such purchases, services, supplies, or materials under the laws prevailing at the time and the policies heretofore or hereafter adopted consistently with those laws; * * *. 76A Stat. 11.

* * * *

2 C.Z.C. § 70. *Payment of excess funds into Treasury.*

The board of directors shall appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion and pay into the Treasury as dividends the amount of funds in excess thereof. The dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the Company as applicable to reduction of past or future direct Government capital contributions (as provided by section 62(f) of this title) in determining the base for interest payments required by section 62(e) of this title. 76A Stat. 13.

* * * *

2 C.Z.C. § 72. *Appropriations to cover losses.*

Appropriations are authorized for payment to the Panama Canal Company of such amounts as may be shown in its annual budget program as necessary to cover losses sustained in the conduct of its activities. Amounts appropriated to the Company under authority of this section may not be added to the amount of the receipt referred to in subsections (a) and (c) of sec-

tion 62 of this title, and may not require payment of interest pursuant to section 62(e) of this title.

Repayments by the Company to the Treasury may not, in any case, be treated as dividends pursuant to section 62(f) and section 70 of this title, until all amounts appropriated to the Company under the authority of this section are repaid to the Treasury. 76A Stat. 13.

* * * *

2 C.Z.C. § 101. *Appointment and compensation of Government employees.*

(a) Except as otherwise provided by law, and subject to the supervision provided by section 31 of this title, the Governor shall:

(1) appoint all officers and employees of the Canal Zone Government; and

(2) prescribe the compensation of officers and employees of the Canal Zone Government, and establish their conditions of employment, including matters relating to transportation, medical care, leave, office hours, and hours of labor.

(b) Compensation prescribed by the Governor under this section may not exceed, in any case, by more than 25 percent, the compensation paid for the same or similar services to persons employed by the Government in the continental United States. The definition of "continental United States" contained in section 141 of this title applies to that term as used in this subsection. 76A Stat. 14.

* * * *

2 C.Z.C. § 121. *Appointment and compensation; duties; delegation of powers; bonds.*

(a) Except as provided by section 64 of this title, the Panama Canal Company may:

(1) appoint, fix the compensation of, and define the authority and duties of, officers, agents, attorneys, and employees necessary for the conduct of the business of the Company; * * *. 76A Stat. 15.

* * * *

2 C.Z.C. § 141. *Definitions.*

As used in this subchapter:

"continental United States" means the several States of the United States of America existing on July 25, 1958, and the District of Columbia;

"department" means a department, agency, or independent establishment in the executive branch of the Government of the United States (including a corporation wholly owned or controlled by the United States) which conducts operations in the Canal Zone;

"employee" means an individual holding a position; and

"position" means those duties and responsibilities of a civilian nature under the jurisdiction of a department:

(1) which are performed in the Canal Zone; or

(2) with respect to which the exclusion of individuals from the Classification Act of 1949, as amended (5 U.S.C., ch. 21), is provided for by section 202(21)(B) of that Act, as amended (5 U.S.C., sec. 1082(21)(B)). 76A Stat. 16.

2 C.Z.C. § 142. *General rules governing wage and employment practices.*

(a) The head of each department shall conduct the wage and employment practices in the Canal Zone of his department in accordance with the:

(1) principles established in item 1 of the Memorandum of Understandings set forth in section 1(b) of Public Law 85-550 (July 25, 1958, 72 Stat. 405);

(2) provisions of this subchapter;

(3) regulations promulgated by, or under the authority of, the President of the United States in accordance with this subchapter; and

(4) provisions of applicable law.

(b) To the extent he deems appropriate, the President may:

(1) exclude any employee or position from this subchapter or from any provision of this subchapter; * * *. 76A Stat. 16.

* * * *

2 C.Z.C. § 144. *Compensation.*

(a) The head of each department, in accordance with this subchapter, shall establish, and from time to time may revise, the rates of basic compensation for positions and employees under his jurisdiction.

(b) The rates of basic compensation may be established and revised in relation to the rates of compensation for the same or similar work performed in the continental United States or in such areas outside the continental United States as may be designated in the regulations referred to in section 155(a) of this title.

(c) The head of each department may grant increases in rates of basic compensation in amounts not to exceed the amounts of the increases granted, from time to time, by Act of Congress in corresponding rates of compensation in the appropriate schedule or scale of pay. The head of the department concerned may make the increases effective as of such date as he designates but not earlier than the effective date of the corresponding increases provided by the Act of Congress.

(d) A rate of basic compensation established under this section may not exceed by more than 25 percent,

when increased by the amounts of the allowance and the differential authorized by section 146 of this title, the rate of basic compensation for the same or similar work performed in the continental United States by employees of the Government of the United States. 76A Stat. 17.

* * * *

2 C.Z.C. § 146. *Additional allowance and differential.*

In addition to established basic compensation, there shall be paid to each employee who is a citizen of the United States such amounts as the head of the department concerned determines to be payable, as follows:

(1) an allowance for taxes which operate to reduce his disposable income in comparison with the disposable incomes of those employees who are not citizens of the United States; and

(2) an overseas (tropical) differential not in excess of an amount equal to 25 percent of the aggregate amount of the rate of basic compensation so established and the amount of the allowance provided in accordance with paragraph (1) of this section. 76A Stat. 17.

* * * *

2 C.Z.C. § 155. *Administration by President; regulations; delegation of authority.*

(a) The President shall coordinate the policies and activities of the respective departments under this subchapter, and may promulgate regulations necessary and appropriate to carry out the provisions and accomplish the purposes of this subchapter.

(b) The President may delegate any authority vested in him by this subchapter, and may provide for the redelegation of any such authority. 76A Stat. 19.

* * * *

Regulations Involved

The Regulations of the Secretary of the Army, promulgated on October 10, 1964, 29 F.R. 14024, and transferred by 31 F.R. 12202, 12344, to 35 C.F.R. (1967 Rev.) § 253.135 (formerly found in 5 C.F.R. (1964 Rev., 1966 Supp.) § 1204.12, which effected the reduction in the rate of the tropical differential, provides:

> (a) An overseas, tropical differential for U. S. citizen employees who qualify under the provisions of paragraph (b) of this section shall be fixed by the head of each department in an amount equal to 15 percent of the aggregate compensation established under §§ 253.131 and 253.134. Such differential will be reviewed periodically by the Secretary of the Army and adjusted to the extent necessary to furnish a suitable incentive in recruitment of qualified personnel and to provide pay benefits substantially equal to those accorded U. S. citizens employed by the Federal Government in comparable foreign areas.
>
> (b) The tropical differential shall be paid to employees who are U. S. citizens except those in the following categories:
>
> (1) A married woman whose husband resides in the Canal Zone or the Republic of Panama. This exclusion shall not apply to such a married woman if she establishes to the satisfaction of her department that:
>
> (i) Her husband is physically or mentally incapable of self-support.
>
> (ii) She is legally separated; or
>
> (iii) Her husband is 51 percent dependent upon her for his support.
>
> (2) A child or stepchild of a resident of the Canal Zone or the Republic of Panama who is under 21

years of age and unmarried or who, regardless of age or marital status, does not maintain a separate household.

(c) Notwithstanding the provisions of paragraphs (a) or (b) of this section, each U. S. citizen employee in service on October 11, 1964, shall retain as a fixed tropical differential an amount equal to 25 percent of the aggregate compensation established under §§ 253.133 and 253.134 for the grade and pay step to which he was assigned on July 20, 1964, or if employed after that date, for the grade and pay step to which he would have been assigned had he been employed on July 20, 1964. Calculation of the fixed differential shall be made without reference to any retroactive pay increases authorized subsequent to July 20, 1964. If the employee's aggregate compensation is reduced after July 20, 1964, by reason of demotion or otherwise, his fixed differential shall be adjusted to the rate which he would have retained had he been assigned the lower grade or pay step on July 20, 1964. The retained rate of tropical differential shall continue to be paid only until one of the following events occurs:

(1) There is a break in service of one day or more;

(2) A two-year period has elapsed since October 11, 1964 and the employee is at that time, or thereafter becomes, ineligible to receive the differential under the conditions prescribed by paragraph (b) of this section; or

(3) The employee becomes eligible for the same or a greater amount of differential under paragraphs (a) and (b) of this section. When the fixed differential is discontinued under this subparagraph due to payment of compensation under § 253.155 for

an additional pay assignment, it shall be reinstated upon termination of such assignment.

(d) An employee must be paid tropical differential under this section only to the extent that such payment, when combined with his aggregate compensation established under §§ 253.133 and 253.134, does not exceed the current rate of step 5, GS-17, of the General Schedule of the Classification Act of 1949, as amended.

Executive Order Involved

Executive Order 11171 of August 18, 1964, 29 F.R. 11897, 3 C.F.R. (1964 Supp.) pp. 174-176, which purportedly conferred authority upon the Secretary of the Army to issue the disputed Regulations fixing the rate of the tropical differential, provides:

THE CANAL ZONE MERIT SYSTEM AND REGULATIONS RELATING TO CONDITIONS OF EMPLOYMENT IN THE CANAL ZONE

By virtue of the authority vested in me by Section 155 of Title 2 of the Canal Zone Code (76A Stat. 19), and as President of the United States, it is hereby ordered as follows:

Section 1. As used in this order:

(1) The term "subchapter III" shall mean subchapter III of Chapter 7 of Title 2 of the Canal Zone Code (76A Stat. 16-20).

(2) The terms "department," "position," "employee," and "continental United States," shall have the meanings ascribed to them in Section 141 of Title 2 of the Canal Zone Code.

• • • •

Sec. 2.(a). Subject to the further provisions of this order, there is delegated to the Secretary of the Army

the authority vested in the President by Sections 142 and 155 of Title 2 of the Canal Zone Code:

(1) To exclude any employee or position from any or all provisions of subchapter III.

• • • • •

(3) To coordinate the policies and activities of the respective departments under subchapter III.

(4) To promulgate such regulations as may be necessary and appropriate to carry out the provisions and accomplish the purposes of subchapter III.

(b) The Secretary of the Army may redelegate any of the authority delegated to him by subsection (a) of this section.

(c) In promulgating regulations pursuant to the authority delegated by this section (including regulations with respect to the matters covered by Sections 3 and 4 of this order), the Secretary of the Army shall give effect to the following—described policies:

(1) Employment standards, rates of basic compensation, availability of training facilities and programs shall be applied uniformly among all departments in the Canal Zone to all employees irrespective of whether they are citizens of the United States or of the Republic of Panama.

• • • •

Sec. 5.(b) Executive Order No. 10794 of December 10, 1958, is hereby superseded.

PART II

DECISION AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23316

BRIGADIER GENERAL WALTER P. LEBER, Governor of the Canal Zone and President, Panama Canal Company,
Appellant,

versus

CANAL ZONE CENTRAL LABOR UNION & METAL TRADES COUNCIL, AFL-CIO, ET AL., *Appellees.*

Appeal from the United States District Court for the Canal Zone

(July 25, 1967.)

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

RIVES, Circuit Judge: This appeal is from a decision by the District Court for the Canal Zone declaring that certain regulations issued by the Secretary of the Army are invalid, as contrary to provisions of the Canal Zone Code,[1] and enjoining the appellant from enforcing these regulations.[2] The involved sections of the Code authorize payment of an overseas differential in addition to basic compensation to each United States citizen employed in the Canal Zone by the executive branch of the United States Government. 2 C.Z.C. § 146. The differential is not to be in excess of an amount equal to 25 percent of the aggre-

[1] 2 C.Z.C. §§ 141-156, 76A Stat. 16-20.

[2] The district court's opinion is reported in 246 F. Supp. 998, et seq.

gate amount of the rate of basic compensation, plus special allowances not here material. In substance, the voided regulations reduce the differential from 25 percent to 15 percent. 5 C.F.R. § 1204.12 (1964 Rev., 1966 Pocket Supp.), now found in 35 C.F.R. ch. I, subch. E, revised as of January 1, 1967. They further provide that the differential will not be paid (1) to a married woman whose husband resides in the Canal Zone or the Republic of Panama unless the husband is 51 percent dependent upon her for his support or the woman is legally separated from her husband, or (2) to a child of a resident of the Canal Zone or the Republic of Panama who is under 21 years of age and is unmarried or who, regardless of age or marital status, does not maintain a separate household.

Appellees are five United States citizens employed by the Canal Zone Government or the Panama Canal Company. Two of the appellees are married women whose husbands are also employed by the Canal Zone Government or the Panama Canal Company. The Secretary of the Army who promulgated the regulations was not served with process and did not appear in the action.

We are of the opinion that the judgment of the district court should be reversed for three reasons: First the action should have been dismissed because the Secretary of the Army is an indispensable party;[3] second, the action was an unconsented suit against the United States; third, sound judicial administration requires that we also discuss

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[3] The problem caused by not being able to serve an indispensable superior outside the terrritorial limits of the district court was almost completely alleviated by the enactment of 28 U.S.C.A. § 1391 (e). We say "almost" because the provisions of this statute do not apply to civil actions brought in the United States District Court for the District of the Canal Zone. See Doyle v. Fleming, D.C. Canal Zone 1963, 219 F. Supp. 277. We must, therefore, decide the thorny question of whether a superior official is an indispensable party.

the merits to meet the possibility that the Supreme Court, on review, may conclude that jurisdiction exists. We find that the regulations do not conflict with the pertinent and controlling sections of the Canal Zone Code, and are not invalid.

We first discuss the jurisdiction questions. Title 2, Section 155 of the Code provides:

> "(a) The President shall coordinate the policies and activities of the respective departments under this subchapter, and may promulgate regulations necessary and appropriate to carry out the provisions and accomplish the purposes of this subchapter.
>
> "(b) The President may delegate any authority vested in him by this subchapter, and may provide for the redelegation of any such authority."

Pursuant to this section, the President delegated his authority over wage and employment practices in the Canal Zone to the Secretary of the Army. Ex. Ord. No. 10794, December 12, 1958, 23 F.R. 9627, and Ex. Ord. No. 11171, August 20, 1964, 29 F.R. 11897.

Title 2, Section 142 authorizes the head of each department to conduct wage and employment practices in accordance with regulations promulgated by or under the authority of the President.[4] A "department" is defined to mean "a department, agency, or independent establishment in the executive branch of the Government of the United States (including a corporation wholly owned or controlled by the United States) which conducts operations in the Canal Zone."

The Canal Zone Government and the Panama Canal Company are departments within the meaning of the statu-

[4] See also 2 C.Z.C. § 101, which provides that the Governor of the Canal Zone shall prescribe compensation of employees subject to supervision by the President or his delegate.

tory definition.[5] It is clear, therefore, that wage and employment practices of these two entities are subject to regulation by the Secretary of the Army. He is the official charged with the responsibility of coordinating the policies and activities of the respective departments and promulgating regulations necessary and appropriate to carry out the intent of the statutes.

With these prefatory remarks, we apply the legal principles involved in determining whether the Secretary of the Army is an indispensable party. This Court has on more than one occasion recognized the difficulty in determining the indispensability of a superior governmental official as a defendant in a suit against his subordinate. *Estrada* v. *Ahrens*, 5 Cir. 1961, 296 F.2d 690; *Johnson* v. *Kirkland*, 5 Cir. 1961, 290 F.2d 440. The commentators share our uncertainty despite repeated efforts by the Supreme Court to clarify the principles involved.[6]

As we read the controlling decisions of the Supreme Court, we find that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, whether by exercising directly a power lodged in him or by having a subordinate exercise it for him." *Williams* v. *Fanning*, 1947, 332 U.S. 490, 493. In *Ceballos* v. *Shaughnessy*, 1957, 352 U.S. 599, 603, the Supreme Court noted that the resolution of the issue also depends "on the ability and authority of the defendant before the court to effectuate the relief" which is sought. See *Colorado* v. *Toll*, 1925, 268 U.S. 228; *Johnson* v. *Kirkland*, 5

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[5] 2 C.Z.C. § 31. "The Canal Zone Government, an independent agency of the United States . . ."

2 C.Z.C. § 61. ". . . the Panama Canal Company is continued as a body corporate and as an agency and instrumentality of the United States."

[6] 3 Moore's Federal Practice, § 19.16; 2 Barron & Holtzoff, Federal Practice & Procedure, § 515; 3 Davis, Administrative Law Treatise (1958), § 27.08.

Cir. 1961, 290 F.2d 440, 446. If the court having jurisdiction over the subordinate can grant effective relief without requiring any act by the superior, then the superior is not indispensable.

The Supreme Court stressed the need for practical considerations. *Shaughnessy* v. *Pedreiro,* 1955, 349 U.S. 48. It is paramount that "simplified, workable procedures favoring judicial review should prevail over formalistic, technical concepts of the source of administrative authority." *Estrada* v. *Ahrens,* 5 Cir. 1961, 296 F.2d at 697.

Mindful of the ruling principles enunciated by the Supreme Court, we turn to the facts of this case. We conclude that any rights the appellees may have cannot be vindicated without specific action being taken by the Secretary of the Army. The Secretary must authorize the payment of any former differential.[7] He must order the payment to employees of any monetary losses resulting from invalid regulations. For duties of Secretary, see H.R. Rep. No. 1869, to accompany S. 1850, 85th Cong., 2d Sess. 7-8 (1958).[8] As in *Johnson* v. *Kirkland,* 5 Cir. 1961, 290 F.2d 440, this is a case where relief cannot be effectuated without specific action by the superior. The enjoining of

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[7] Prior to the 1964 revision, 5 C.F.R. § 1204.12 read as follows:

"Tropical differential

"A tropical differential not in excess of an amount equal to 25 per cent of the aggregate compensation established under §§ 1204.10 and 1204.11 will be authorized for U.S. citizen employees."

[8] The Secretary must also perform acts not directly pertinent to the relief sought by the appellees. As coordinator and supervisor of the wage policy and activities of all department heads, the Secretary must see that employees of departments, other than the two headed by the appellant, receive reimbursements for any losses. He must also determine if the wage policies of other departments are to be adjusted in conformity with the wage standards adjudged mandatory for the Canal Zone Government and the Panama Canal Company.

the appellant without any action by the Secretary will not assure the payment of the 25 percent differential or reimbursement for any losses.[9]

The appellees contend that this suit is solely to enjoin the Governor of the Canal Zone, who is also the President of the Panama Canal Company, from further implementation, enforcement and application of the Secretary's regulations. They claim that there is no prayer or request for any affirmative action on the part of the Secretary. In short, they say that they are asking for a declaration that the regulations are invalid and that the appellant be enjoined from enforcing them.

Appellees admit that their primary goal is restoration of the 25 percent differential to all United States citizens. They suggest that the invalidation of the regulations will require the appellant to reinstate the 25 percent differential. Their entire argument rests on the proposition that it is mandatory that the tropical differential shall be no less than 25 percent. Avoiding form and paying heed to substance, we are quite sure that the appellees do not seek to enjoin the appellant from implementing any differential. If the appellant is enjoined from enforcing the newly promulgated regulations, then he is left with one of two courses: (1) He may reinstate the 25 percent differential, or (2) he may pay no differential. The appellees seek the first course; the second would deny them even half a loaf. Thus we reach the heart of this issue—can the appellant without any action on the part of the Secretary reinstate the 25 percent differential? We think not, and

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[9] Malone v. Bowdoin, 1962, 369 U.S. 643; Larson v. Domestic and Foreign Corp., 1949, 337 U.S. 682.

therefore conclude that the Secretary is an indispensable party.[10]

[10] Assuming that the appellees sought no affirmative relief or had no inclination or desire that this action would require the appellant to reinstate the 25 percent differential, would the necessity of the Secretary acting at some later time in order to conform to the declaration of the court in this action require him to be a party to this action? The language in the cited Supreme Court cases and in the cases by this Court certainly suggest that proper judicial procedure would make indispensable any party who would be forced to take action, even at a time in the future, as a direct result of the decision.

Were it not for statements indicating otherwise in the latest Supreme Court decisions, see especially Ceballos v. Shaughnessy, 352 U.S. 599, we might be persuaded by the reasoning of Professor Davis:

> "Even though officers not before the court cannot be ordered to act or to refrain from acting, a declaratory judgment can be granted despite the fact that it will require officers not before the court to take affirmative action. For instance, in Ceballos, the declaratory judgment that the alien was eligible for deportation had the practical effect of requiring the Board of Immigration Appeals, not before the Court, to change its decision to the contrary. Furthermore, the equity court may grant a mandatory injunction against the subordinate, ordering him to transmit the decision and the order to the superior. Depending on circumstances, the subordinate may be enjoined from further action against the plaintiff until the superior has complied with the court's order or declaration.
>
> "In the exceedingly unusual case in which a superior officer refuses to comply, a suit against the superior could be brought in the District of Columbia. The decision against the subordinate would probably be res judicata."

Davis, Administrative Law Treatise, § 27.08, p. 600, n. 48.

This action is also an unconsented suit against the United States.[11] The complaint alleges that the appellant is acting in a manner not permitted by the statute. Normally such an allegation is a permissible basis for a suit against an individual, and the government is held not to have sufficient interest in the controversy to be considered an indispensable party. The government, however, does not always lack such interest in cases where the suit is nominally against the officer as an individual. *Mine Safety Appliances Co.* v. *Forrestal*, 1945, 326 U.S. 371, 374.[12]

In *Mine Safety Appliances*, the Supreme Court noting "the essential nature and effect of the proceeding" concluded that, where the suit was to collect money from the government and not the individual defendant, "the government is an indispensable party." 326 U.S. at 375. The suit in that case was dismissed because the government was an indispensable party and had not consented to be sued.[13] In later decisions, the Court re-emphasized the rule that relief sought nominally against an official is in fact against the government "if 'the judgment sought would expend

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[11] The appellant concedes that suits against the Panama Canal Company are authorized. 2 C.Z.C. § 65(3). The indispensableness of the Secretary prevents this action.

[12] If the complaint alleges that the official involved acts beyond his statutory powers, there normally is no need to join the government. Where action of the sovereign will be required, joinder is required. Larson v. Domestic and Foreign Corp., 1949, 337 U.S. 682, 691, n. 11.

[13] This Court has previously noted that the government is the real party in interest in suits brought against officials apparently acting within the ambit of a statute or a regulation. Estrada v. Ahrens, 5 Cir. 1961, 296 F.2d 690, 698. Federal statutes waiving governmental immunity in such suits indicate that the government is the real defendant. See, e.g., Federal Tort Claims Act of 1946, 28 U.S.C.A. § 2674.

The material question in this case is whether the government, being an indispensable party, has consented to be sued in the District Court for the Canal Zone.

itself on the public Treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act,' *Larson* v. *Domestic & Foreign Corp., supra* [337 U.S. 682] at 704 . . . .'' *Dugan* v. *Rank*, 1963, 372 U.S. 609, 620. See also *Hawaii* v. *Gordon*, 1963, 373 U.S. 57.[14]

There is no dispute that the direct effect of the relief sought by appellees would expend itself on public appropriations. The United States was therefore an indispensable party and the district court for the Canal Zone was not a court in which the government had consented to be sued.[15]

Nonetheless, there is a possibility that the Supreme Court may differ with us on the jurisdictional questions, and we therefore discuss the merits of the case.[16]

The legislative history reveals that Congress intended that the Secretary possess discretionary authority to reduce the overseas differential to less than 25 percent. In 1912 Congress enacted permanent legislation providing for the maintenance and operation of the Panama Canal and the government of the Canal Zone. Act of August 24, 1912, ch. 390, 37 Stat. 560. Section 4 of the Act made the following provisions with respect to appointment and salaries:

> ". . . persons necessary for the completion, care, management, maintenance, sanitation, government, opera-

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[14] This general rule has been criticized by one commentator, who has even suggested that the Supreme Court has not always adhered to the rule. Davis, Administrative Law Treatise, § 27.01 (1965 Supp.), pp. 149-154.

[15] Wells v. United States, 5 Cir. 1954, 214 F.2d 380. Cf. 28 U.S.C. § 451; 28 U.S.C. § 1346 (a)(2).

[16] The jurisdictional issues are determined according to our reading of present Supreme Court cases. The doctrine of indispensableness and sovereign immunity are not so fixed as to be exempt from new interpretations and theories.

tion, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States."

That language pertaining to the differential was retained in the subsequent legislation preceding the Act of July 25, 1958.[17]

In 1958 Congress passed legislation[18] which is now codified in the present Canal Zone Code.[19]

Section 146 in part provides:

"In addition to established basic compensation there shall be paid to each employee who is a citizen of the United States such amounts *as the head of the department concerned determines* to be payable as follows:

" . . . .

"(2) An overseas (tropical) differential not in excess of an amount equal to 25 percent of the aggregate amount of the rate of basic compensation so established and the amount of the allowance provided in accordance with paragraph (1) of this section." [Emphasis added.]

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[17] See, e.g., 2 C.Z.C. (1934 ed.) § 81(c). Section 3 of the Act of July 9, 1937, ch. 470, 50 Stat. 486.

[18] Act of July 25, 1958, 72 Stat. 405, et seq.

[19] 2 C.Z.C. ¶¶ 141-156, 76 A Stat. 16-20.

Section 101 (b) of Title 2 of the Code retains the language found in earlier statutes:

> "Compensation prescribed by the Governor under this section may not exceed in any case, by more than 25 percent, the compensation paid for the same or similar services to persons employed by the Government in the continental United States." [20]

Our reading of the plain language of the present and prior statutes indicates that Congress intended that the heads of the departments on their own initiative or pursuant to controlling regulations[21] may pay a differential less than 25 percent.[22]

The Congressional debates and hearings support this position. The purpose of an overseas differential is to enable "the President to secure competent services" outside the continental United States. 48 Cong. Rec. 6768. The Overseas Differential and Allowances Act, 5 U.S.C. §§ 3031, et seq., and section 204 of the Independent Offices Appropriation Act of 1949, 5 U.S.C. § 118h, do not pertain to the Canal Zone, but do exhibit congressional intent to permit the President to offer monetary incentives to civilians employed outside the continental United States:

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[20] See also ¶ 144 of Title 2.

[21] Section 142 provides that each department head shall conduct wage practices in accordance with regulations promulgated by the President or his delegate.

[22] "Such amounts as the head of the department concerned determines to be payable" in Section 146 refers to the allowances for taxes noted in ¶ 146(1) and the differential noted in ¶ 146 (2). This quoted clause does not merely authorize the department heads to compute the basic compensation and add the appropriate tax allowance plus 25 percent as the appellees suggest. This suggestion implies that Section 146 permits the department head to perform no more than mechanical computations and that the word "determine" means compute. We reject this narrow interpretation of the section.

> "A post differential may be granted on the basis of conditions of environment which differ substantially from conditions of environment in the continental United States and warrant additional compensation as a recruitment and retention incentive." 5 U.S.C.A. §3038.

See also, H.R. Rep. No. 1869 to accompany S. 1850, 85th Cong., 2d Sess. 17 (1958).

Recognizing the purpose of overseas or tropicial differential, we conclude that Congress meant to leave the amount of the differential to the discretion of the President and his delegates. Congress determined that the President had to decide what incentives were necessary to encourage civilians to work in hardship areas. The House Committee Report is instructive:

> "Under [2 C.Z. Code ¶ 146(a)(2)] an overseas (tropical) differential *may be paid* in an amount not in excess of an amount which is equal to 25 percent of the aggregate amount of the rate of basic compensation established under [2 C.Z. Code ¶ 144] and the amount of the allowance provided in accordance with section [2 C.Z. Code ¶ 146(a)(1)]." (Emphasis added.)

The debates involving the Act of 1912 further reveal that the 25 percent figure was not a mandatory rate to be applied, but a ceiling not to be exceeded:

> "Mr. Chairman, I think it is generally understood by gentlemen that we have been having to pay a differential of more than 25 percent—I think from 30 to 75 percent in some cases—down on the canal, and gentlemen have thought it was wise to put some limitation upon the amount of salaries to be fixed for these minor offices." (Congressman Adamson, 48 Cong. Rec. 6768.)

The challenged regulations which reduce the percentage to 15 percent are within the purview of Section 155 of Title 2. The Secretary has made a determination that a 15 percent differential will suffice to carry out the purposes of the Code. There has been no misuse of discretionary power by the enacting of the regulations.[28]

We also agree with the appellant that the district court erred in holding invalid the regulation excluding certain married women and children from receiving the differential. The court held that the regulation conflicted with language in Section 146, which it read as *requiring* a differential to be paid to *each* employee.

The appellant makes no attempt to interpret Section 146 in a manner which would permit the Secretary to pay the wage differential to some United States citizens but not to others. Instead, the appellant suggests that Section 142 (b)(1) of Title 2 provides ample authority for the actions taken. This section provides:

> "To the extent he deems appropriate the President may:
>
> "(1) exclude any employee or position from this subchapter or from any provision of this subchapter."

There is a dearth of legislative history concerning this section. It is suggested that this section was included solely to permit the President to exclude the Governor, the Deputy Governor, the President of the Canal Zone, and other similar officials from the provisions of the sub-

[28] We agree with the appellant that if the Secretary's interpretation of the statute is not unreasonable it should be adopted by the courts. Udall v. Tallman, 1965, 380 U.S. 1, 18.

chapter.[24] Certainly this interpretation is possible and has some support in the congressional debates. However, we are not so certain as the appellees are that this is the meaning of Section 142 (b)(1). The totality of the legislative history, including the debates and reports accompanying the bill,[25] indicate that Congress was mainly concerned with equal treatment for employees regardless of whether they were citizens of the United States or of Panama.[26] The statements of Congressman Hemphill, see note 24, *supra*, most probably were made to alleviate any fears that Section 142 would permit the President to deny

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[24] "*Mr. Hemphill.* Mr. Speaker, I have asked for this time only for the purpose of clarifying one section of the bill and one part of the report.

"Under Section 3 of the bill, item (b-1) on page 7, the President of the United States as administrative authority under the terms of this legislation, is authorized to exclude any employee or position from the act or provision of the act. I would like to read into the RECORD at this point a part of the able report made by the chairman of the subcommittee to the full committee. Page 3 of that report says:

> "Section 3 authorizes and directs the head of each department or agency operating in the Canal Zone to conduct the employment and wage practices in accordance with the principles of the memorandum of understanding, the provisions of this bill, and regulations prescribed by or under the authority of the President. Also it authorizes the President to exclude any employee from this act. *This exclusion is necessary in case of the Governor of the Canal Zone, the Deputy Governor, the President of the Panama Canal, and other similar officials.* [Emphasis added.]

"I read into the RECORD for the purpose of clarification." 104 Cong. Rec. 11387.

[25] H.R. Rep. No. 737 to accompany S. 1850, 85th Cong., 2d Sess. (1958).

[26] See Treaty of Mutual Understanding and Cooperation between the United States and the Republic of Panama, 72 Stat. 405, and the Memorandum of Understanding accompanying the treaty.

benefits to employees on account of citizenship. It is extremely doubtful that this section meant that the President could exclude only executive officials from the provisions of the subchapter.[27]

A reading of all parts of the subchapter and an understanding of the purpose of the differential lead us to conclude that the Secretary could make reasonable exclusions of United States citizens from the benefits of the differential.

The appellees make a further argument which merits brief consideration. We quote directly from their brief:

> "If the appellant's contention, that the language of subparagraph (2) of § 146, coupled with the language of § 142(a)(3) and § 155, is intended to confer discretion upon the Secretary of the Army to alter or reduce the amount of the tropical differential by the issuance of regulations, is adopted, it plainly would be necessary to declare this subparagraph invalid as an improper delegation of the legislative power by Congress to officials of the Executive Branch."

The authorities cited by the appellees do not include recent pronouncements by the Supreme Court. The doctrine of delegated powers has undergone immense and radical change since the cases relied on by the appellees were handed down. See Davis, Administrative Law Treatise, §§ 2.01 and 2.04.

The Supreme Court upheld rules of the Interstate Commerce Commission which were promulgated pursuant to a section granting power to "administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." The

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[27] For other employees who have been excluded from various provisions of this subchapter, see 5 C.F.R. § 1201.100 (1964 ed.). Note 5 C.F.R. § 1201.3 (1964 ed.).

Court rejecting the argument that the rules were unauthorized held:

> "We hold then that the promulgation of these rules for authorized carriers falls within the Commission's power, despite the absence of specific reference to leasing practices in the Act . . . The grant of general rule-making power necessary for enforcement compels this result."

American Trucking Assns. v. *United States,* 1953, 344 U.S. 298, 312.

In *Carlson* v. *Landon,* 1952, 342 U.S. 524, 542, 543, 544, the Supreme Court in upholding a delegation of authority to the Attorney General to grant or deny bail to aliens, pending determination as to their deportation, noted that

> "the Attorney General is left without standards to determine when to admit to bail and when to detain . . . . Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose. Congress need not make specific standards for each subsidiary executive action in carrying out a policy . . . . A wide range of discretion in the Attorney General as to bail is required to meet the varying situations arising from the many aliens in this country.
>
> "The policy and standards as to what aliens are subject to deportation are, in general, clear and definite . . . . This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards."

The purpose of the differential is admitted to be an inducement to get American citizens to work overseas in so-called hardship areas and to alleviate some of the financial burdens of taking such employment. We cannot say that these regulations conflict with the purpose of the legislation or in any manner overstep the limits or

standards obviously implied.[28] On the contrary, they supplement legislation giving the President or his delegate supervisory authority over the maintenance and operation of the Panama Canal and the administration of the Canal Zone Government. We find no impermissible or unconstitutional delegation of powers by Congress to the President or his delegate.[29]

The judgment is therefore reversed with directions that the action be dismissed.

REVERSED.

WISDOM, Circuit Judge, specially concurring:

I concur in the result and in that portion of the majority's opinion dealing with the merits. I question whether the Secretary of the Army was an indispensable party. Even though we hold against the plaintiffs on the merits, their theory of the case is that the injunction against the Canal Zone government was sought only to prevent enforcement of the 1964 Amendment. This injunction, as the plaintiffs contend, would leave in effect the original 25 per cent regulation. The superior officer, therefore, would not be required to act in order for the plaintiffs to obtain the relief they seek. See *Estrada* v. *Ahrens*, 5th Cir., 1961, 296 F.2d 690; Jaffe, Judicial Control of Administrative Action 157 (1965); Davis, Administrative Law Treatise § 27.08.

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[28] The contention that the regulations take away a needed monetary benefit should be addressed to the Secretary, possibly in a properly conducted administrative hearing, or to Congress. This Court cannot substitute its judgment for the Secretary's.

Lest we are misunderstood, we make no comment as to the correctness of the proceedings leading to the promulgation of the challenged regulations. Neither has there been any suggestion or indication that the regulations were promulgated in violation of proper administrative rules.

[29] See Arizona v. California, 1963, 373 U.S. 546.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23316

D. C. Docket No. CA 5858

BRIGADIER GENERAL WALTER P. LEBER, Governor of the Canal Zone and President, Panama Canal Company,
Appellant,

versus

CANAL ZONE CENTRAL LABOR UNION & METAL TRADES COUNCIL, AFL-CIO, ET AL., *Appellees.*

Appeal from the United States District Court for the Canal Zone.

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Canal Zone, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with directions that the action be dismissed, in accordance with the opinion of this Court.

WISDOM, Circuit Judge, specially concurs.

July 25, 1967

Issued as Mandate: Aug 16 1967

PART III

DECISION, AMENDED DECISION, DECLARATORY JUDGMENT, ORDER OF PERMANENT INJUNCTION, AND ORDER STAYING INJUNCTION PENDING APPEAL OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

Decision of District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE CANAL ZONE
BALBOA DIVISION

Civil No. 5858

CANAL ZONE CENTRAL LABOR UNION AND METAL TRADES COUNCIL, AFL-CIO, an employee-labor organization, PAUL W. BRAMLETT, an employee of the Panama Canal Company, PAULINE F. BLANEY, an employee of the Canal Zone Government, ALBERT F. HANSON, an employee of the Canal Zone Government, JAMES J. O'DONNELL, an employee of the Panama Canal Company, LYDIA M. MYERS, an employee of the Canal Zone Government, *Plaintiffs*

versus

ROBERT J. FLEMING, JR., Governor of the Canal Zone and President of the Panama Canal Company and STEPHEN AILES, Secretary of the Army and Sole Stockholder in the Panama Canal Company, *Defendants*

STATEMENT OF THE CASE

This action was begun by plaintiffs on November 12, 1964 by the filing of a complaint praying for a declaratory judgment that certain regulations promulgated by the defendant, Secretary of the Army, are invalid and for an injunction restraining the further implementation of the regulations.

The Canal Zone Government is an independent agency of the United States administered by a Governor under the

supervision of the President or such officer of the United States as may be designated by the President. 2 C.Z.C. 31. The President has delegated this supervision to the Secretary of the Army under Ex. O. 10595, 3 C.F.R. (1954-58 Comp.) p. 242.

The Panama Canal Company is a corporate agency and instrumentality wholly owned by the United States. 2 C.Z.C. 62. The Governor serves, ex officio, as president of the Company. 2 C.Z.C. 64.

Wage and employment practices of both the Government and the Company are regulated by Subchapter III of the Canal Zone Code, 2 C.Z.C. 141, et seq.

2 C.Z.C. 155 provides:

> "(a) The President shall coordinate the policies and activities of the respective departments under this subchapter, and may promulgate regulations necessary and appropriate to carry out the provisions and accomplish the purposes of this subchapter.
>
> "(b) The President may delegate any authority vested in him by this subchapter, and may provide for the redelegation of any such authority. 76A Stat. 19."

President Johnson delegated his power under the statute to the Secretary of the Army in Ex. O. 11171 of August 20, 1964, 29 F.R. 11897.

For many years the employees of the Canal Zone Government and the Panama Canal Company, and before the creation of these entities, the employees of the preceding organizations received a 25 per cent overseas (tropical) differential. On July 28, 1964, the Secretary announced his proposal to modify the differential on the basis that environmental and cost-of-living factors, which at one time may have justified it, no longer exist.

The Secretary on July 29, 1964, modified the existing regulation, 5 C.F.R. 1204.12 by publishing in the Federal Register an interim regulation which froze the differential for each U. S. citizen employee in the dollar amount authorized for him as of July 20, 1964 and prohibited further increases in the differentials pending further revisions of the regulations.

On October 10, 1964 the Secretary published in the Federal Register a regulation which superseded and terminated the interim regulation. The new regulation, 29 F.R. 14024, provides that the tropical differential be fixed at 15 per cent of the basic compensation as to employees newly hired. As to employees currently on the payrolls, with certain exceptions, the dollar amount then being paid would be reduced, but would be retained at the fixed dollar amount, without increase during future pay raises, until such time as 15 per cent of a given employee's attained salary should exceed his fixed dollar amount of differential. In other words, the 25 per cent differential would be gradually reduced to 15 per cent.

The new regulation excludes from the differential married women whose husbands reside in the Canal Zone or the Republic of Panama and children of such residents who are minors or who do not maintain separate households. (The termination date of their differentials becomes effective two years after the effective date of the regulation.)

The fixed or frozen differential as to the employees currently on the payroll was calculated as of July 5, 1964. Subsequent to that date the Canal Zone Government and the Panama Canal Company granted increases in basic compensation to their employees similar to the increases enacted in P.L. 88-426, the Government Employee's Salary Reform Act of 1964, 78 Stat. 400. These increases were retroactive to the first pay periods in July (July 5, 1964) but were not considered to affect the retained differential which had been set at the amount currently due as of July

20, 1964. In other words, the retroactive pay increase created a condition whereby the employees suffered an immediate diminution from the 25 per cent.

Plaintiffs Paul W. Bramlett and James J. O'Donnell are employed by the Panama Canal Company and were so employed on July 20, 1964. Bramlett is a control house operator in the non-manual category and O'Donnell is a senior operator in power branch group special category—wage board. Both allege adverse effects on their retirement benefits. Bramlett alleges a loss of $2.40 salary per pay period and O'Donnell alleges a loss of 23 cents per hour.

Plaintiffs Albert Hanson, Pauline Blaney and Lydia Myers are employees of the Canal Zone Government and were so employed on July 20, 1964. All three allege an adverse effect on their retirement benefits and Hanson, a window clerk in the postal group special category, alleges reduction of $3.20 in his salary per pay period.

Plaintiff Blaney, a staff nurse in the non-manual category, alleges a reduction of $1.60 in her pay per pay period, and plaintiff Myers, a nurse-anesthetist, alleges a reduction of $2.40 in salary per pay period. Both allege that as they are married female employees the regulation discriminates against them by reason of their sex and marital status and that within a period of two years they will each be deprived of any tropical differential.

They further complain that the regulation is in contravention of Ex. O. 10980 of December 16, 1961 (26 F.R. 12059) in which the President set forth his desire to assure nondiscrimination on the basis of sex and to enhance constructive employment opportunities for women in the employ of the United States Government and its agencies.

The plaintiff, Canal Zone Central Labor Union & Metal Trade Council, AFL-CIO alleges that the defendant, Ailes, promulgated the regulation and defendant, Fleming, im-

plemented and effectuated it in the Canal Zone without first consulting with this plaintiff. It claims formal recognition under Ex. O. 10988 (3 C.F.R. (1959-63 Comp.) p. 521) and alleges that under section 5 (b) of that Order it was entitled to be consulted prior to the formulation or modification of rates of pay and compensation of Canal Zone Government and Panama Canal Company employees.

There are no questions of fact except concerning the matter of consultation with the plaintiff trade union. Counter affidavits have been submitted on that question.

The Secretary of the Army has not been served with process and has not entered his appearance.

As the interim regulation published on July 29, 1964 has been superseded and terminated by the regulation issued on October 10, 1964, 29 F.R. 14024, its terms will not be discussed in this opinion.

The code provision in question is Title 2, Canal Zone Code, 146, as follows:

"§ 146. Additional allowance and differential

"In addition to established basic compensation, there shall be paid to each employee who is a citizen of the United States such amounts as the head of the department concerned, determines to be payable, as follows:

"(1) an allowance for taxes which operate to reduce his disposable income in comparison with the disposable incomes of those employees who are not citizens of the United States; and

"(2) an overseas (tropical) differential not in excess of an amount equal to 25 percent of the aggregate amount of the rate of basic compensation so established and the amount of the allowance provided in accordance with paragraph (1) of this section. 76A Stat. 17."

OPINION

1.

Defendants proceeded on the premise that Title 2, Canal Zone Code, Section 146 without doubt reposes in the "head of the department concerned" the discretionary authority to establish or not an overseas differential as long as it does not exceed 25 per cent of the aggregate amount of the rate of basic compensation paid to the U. S. Citizen employee. They assume the position that "there is nothing in any statute or executive order which requires that a tropical differential in any fixed amount be paid to such employees in the Canal Zone."

Such a position is erroneous as the only reasonable interpretation that can be put upon Section 146 supra is that it is mandatory and that the differential shall be 25 per cent but "not in excess" of that sum. If any other construction is placed upon the meaning of the section it will lead to the intolerable differences and conditions that are the reason for this lawsuit.

Under the weird concoction that has been issued from the office of the Secretary of the Army we are confronted with a condition where two nurses, being U.S. Citizens of the same age, education, and training, will work side by side doing the same work and one will receive at least 15 per cent less than the other merely because she is married. The same constant tropical heat will affect them both, and they will be exposed to the same living conditions overseas away from their homes, relations and friends and the same inability to own property will prevail upon them. They will be subject to the same regimentation and tropical illness pointed up in the Booz-Allen Report set out in plaintiffs' brief yet they will not receive the same pay. The nurses situation is typical and not special for the same odious comparisons prevail among many others and will continue to prevail if defendants' position is maintained.

Under the regulation, if a married woman is "legally separated" from her husband and is a U.S. citizen employee, she can receive the differential. Marriages are hard enough to conserve in the Canal Zone with all of the problems brought about by the life here and a regulation such as this not only will contribute to bring about separations by connivance but actual disruption of what would be successful unions under other circumstances. In effect, a premium is awarded for terminated marriages.

Congress did not intend a situation like this to exist and although a first reading of the section may lead one to believe that discretion was conferred on the proper officer, a careful analysis of its language leads only to the conclusion that such is not the case.

Defendants assume the position that because the word "determine" ordinarily implies discretion and the words "in excess of" frequently connote a sum less than but not greater than, that that is their meaning here, but this is not true. "Determine to be payable" here means to calculate along fixed lines without discretion, and the words "in excess of" have no preliminary words or phrases that would lend to them the meaning that less could be paid than the amout prescribed.

The introductory paragraph is unequivocal in saying that there "shall" be paid to each U.S. citizen employee such amounts as the head of the department "determines to be payable". This does not mean that the department head can determine arbitrarily an amount that he would like to pay, but he must pay an amount to be determined in accordance with the language of the subparagraphs.

Subparagraph (1) leaves no room for doubt that he must determine to be payable "an allowance for taxes" which will permit the U.S. Citizen to come out with the same net after payment of U.S. taxes that the non-citizen employees realize as a result of being exempt from payment of U.S.

taxes. The department head has no option and must determine this amount "payable" after proper mathematical calculation that will make to them a compensatory "allowance for taxes".

He must also just as surely determine to be payable in accordance with subparagraph (2) "an overseas (tropical) differential not in excess of an amount equal to 25 per cent" of the amount of the employee's aggregate compensation. This does not mean that he can pay less than 25 per cent. The language of the act does not give him the authority to diminish, differentiate between married and unmarried women, nor do away with the differential completely in other cases as the Secretary's regulation would do. It merely places a maximum on the amount to be paid. If Congress had wished the employment authority in the Canal Zone to have the power to scale down the differential in accordance with changing conditions or the whims of the Secretary of the Army, it would have said so but it did not. Instead it said in the opening paragraph of section 146 and in subparagraph (2) when read together that there "shall" be paid to the U.S. citizen employee a 25 per cent tropical differential which the "head of the department concerned" must compute, but the differential must not be more than 25 per cent of the aggregate basic compensation of the employee including the tax allowance. (See footnote.)

2.

Defendants assert that the Secretary of the Army is an indispensable party. The Secretary has not entered his appearance to the action and is taking advantage of the difficulties encountered by plaintiffs in perfecting service on him. Such a maneuver is obviosuly designed to hinder a determination of this action in a proper forum on its merits and should not be indulged in by a high U.S. Official. Personal service on him in the Canal Zone is al-

most impossible because of his unheralded entries and the close military protection surrounding him.

The Canal Zone Government and the Panama Canal Company are under the control and direction of the Secretary of the Army, and the Governor of the Canal Zone and President of the Panama Canal Company is a Major General in the Army. The Lt. Governor of the Canal Zone Government and Vice-President of the Panama Canal Company is a Colonel in the Army. All of the thousands of employees in the two organizations are under the Secretary and subject to his regulations. In addition, the headquarters of the Southern Command are located here with a staff of generals and subordinates directing all of the activities of the military missions in every country in Central and South America with thousands of supporting military personnel.

Large training programs and schools are conducted here for the military under the direction of the Secretary and his aides and extensive airports are maintained by the military with aircraft flying regularly from the Canal Zone to Washington and vicinity.

The Panama Canal Company has a large staff of lawyers in the Canal Zone who are ready to serve the Secretary at a moment's notice. There is a United States District Attorney and his assistant and supporting personnel in the Canal Zone and the Army maintains a large staff of legal officers here.

The Secretary visits the Canal Zone periodically and the under secretaries and the Secretary's aides and subordinates are in and out of the Canal Zone frequently.

All of the information and data relative to this litigation and the people concerned in it are here or easily available and the Department of Justice can render its wonderfully efficient service to the Secretary, as fully evidenced

by the extensive pleadings and carefully prepared briefs in the case at bar.

Were this merely litigation designed to annoy without merit and no real principle involved the failure of entry of appearance would be understood but such is not the case. This is a cause affecting the livelihood and welfare of thousands of well-trained, conscientious American citizens who are entitled to have their rights adjudicated, and this court is the most logical and convenient forum.

Congress has recognized the need to make it possible to bring actions such as this against Government officials and agencies in the United States District Courts outside the District of Columbia by the adoption of 28 U.S.C. 1391(e)(Supp. 1962) which provides for service by "registered mail". Unfortunately it is limited to United States District Courts and these courts are enumerated in 28 U.S.C. 81-144 and the Canal Zone court is not included although courts farther from Washington, such as those of Hawaii and Alaska, are included.

With these conditions in mind it is incumbent on this court to give relief to the litigants if possible.

Title 2 C.Z.C. 31 provides that the Canal Zone Government, an independent agency of the United States, shall be administered by the Governor of the Canal Zone. This is to be under the supervision of the President or his designee and as previously stated, he has designated the Secretary of the Army to act.

Title 2 C.Z.C. 31 provides that the Governor shall have official control and jurisdiction over the Canal Zone and Section 101 of the same title authorizes and charges him with the appointment of all officers and employees of the Canal Zone Government and the duty of prescribing their compensation.

Title 2 C.Z.C. 61 and subsequent sections of Chapter 5 prescribe for the continuation and organizational activities of the other principal U. S. entity here, which is the Panama Canal Company. Section 62 provides that the President of the United States or his designee shall be known as the "stockholder" and shall represent the United States in its capacity as owner of the Company and as previously stated, the Secretary of the Army has been designated as the stockholder.

Section 64 of the chapter prescribes that the Governor "shall serve, ex officio, as president of the Panama Canal Company"; Section 121 provides for the corporate acts of the Company in appointing its "officers, agents, attorneys, and employees" and fixing their compensation, and Subchapter III of the same title provides for the "Wage and Employment Practices" all under the direction and control of the department heads who in turn are under the immediate direction and control of the Governor.

It is quite clear therefore that an injunction entered restraining the Governor and President of the Panama Canal Company from implementing the regulation in question would grant the relief desired. There is no question that this is a proper remedy and that it may be pursued against him although his superior officer is not before court. The State of Colorado v. Toll, Supt. of Rocky Mountain National Park 268 U.S. 228; Missouri v. Holland, 252 U.S. 416; Philadelphia Co. v. Stimson, 223 U.S. 605.

Were the Secretary before court, and he is named as a party defendant in plaintiffs' attempt to make him a party, a decree of injunction against him would be no more effective than it would against the defendant Governor-President who has the sole responsibility and authority in the Canal Zone to implement the regulation. See Berdie et al v. Kurtz et al., 75 F. 2d 898. In Shaughnessy, District Director of Immigration, etc. v. Pedreiro, 349 U.S.

48, the court rejected the Government's contention that the Commissioner of Immigration and Naturalization is an indispensable party and said:

> "It seems highly appropriate, therefore, that the District Director charged with enforcement of a deportation order should represent the Government's interest. Otherwise in order to try his case an alien might be compelled to go to the District of Columbia to obtain jurisdiction over the Commissioner. To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule. *Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner.*" (Italics supplied)

The chain of command is direct from the Secretary of the Army to the Governor-President thence to the employees of the two entities throughout the Canal Zone so an injunction stopping the Governor-President would terminate the action and grant the relief sought.

3.

The regulation states that the tropical differential shall be paid to employees who are U.S. citizens except those in the following categories:

> "(1) A married woman whose husband resides in the Canal Zone or the Republic of Panama. This exclusion shall not apply to such a married woman if she establishes to the satisfaction of her department that:
>
> "(i) Her husband is physically or mentally incapable of self-support.
>
> "(ii) She is legally separated; or

"(iii) Her husband is 51 percent dependent upon her for his support.

"(2) A child or stepchild of a resident of the Canal Zone or the Republic of Panama who is under 21 years of age and unmarried or who, regardless of age or marital status does not maintain a separate household."

The retained rate of tropical differential under the regulation shall continue to be paid to people in the above categories, however, until there is a break in service of one day or more or a two-year period has elapsed since the effective date of the regulation.

This part of the regulation is certainly discriminatory against married women and is violative of Title 2, C.Z.C. 146 wherein it states that "there shall be paid to each employee who is a citizen of the United States" an overseas tropical differential. The section is clear and emphatic that "each employee" receive the differential and any variation from that plan is a violation of the Congressional mandate.

(*The following four paragraphs are to to be deleted by amended decision.)

*The regulation is also in violation of the new law generally known as the Civil Rights Act which is the Act of July 2, 1964, Public Law 88-352, 88th Congress, H.R. 7152. Title VII of the Act relates to Equal Employment Opportunity and is applicable in the Canal Zone specifically by Section 701(e), subparagraph (i) of paragraph (5). Section 703(a) is as follows:

*"It shall be an unlawful employment practice for an employer—

*"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"'(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

It may be advanced that the regulation does not discriminate as to "sex" but only as to marital status. Such an argument is without merit for married men are not so affected, only married *women.*

4.

As stated, the payment of the differential of 25 per cent to the individual plaintiffs herein is a right based upon a statute. This right has been injured by the action of the Secretary in promulgating a regulation to reduce the differential as has been alleged in the complaint, and it is undenied that these five plaintiffs have suffered immediate monetary losses by the reduction in their differentials. These reductions are not vague, imaginary possibilities of the future but are real and present and subject to calculation.

As argued by the defendants, "the touchstone of justiciability is injury to a legally protected right. . ." See Frost v. Corporation Commission, 278 U.S. 515.

A general pay increase occurred almost simultaneously with the implementation of the interim regulation so the damage and injury has been personal to the five individual plaintiffs and fully calculable. The case retains all of the essentials of an adversary proceeding involving a real and not a hypothetical controversy. See Poe v. Velman,

367 U.S. 497; United Public Workers v. Mitchell, 330 U.S. 75.

There is, therefore, no question that the five individual plaintiffs have standing to sue.

5.

The plaintiff, Canal Zone Central Labor Union and Metal Trades Council, AFL-CIO, does not have standing to sue as a result of Executive Order 10988 (3 C.F.R., 1959-63 Comp., p. 521). As stated by defendants' counsel, it is no more than a declaration of policy by the President of the internal management of the Executive Branch of the United States Government enforceable only by the President through administrative measures. It is not based upon a statute nor a provision of the Constitution and thus the courts have no jurisdiction over an action for enforcement.

A similar question was raised covering the same Executive Order in International Organization of Masters, Mates & Pilots, etc. v. Panama Canal Company, etc., Civil Number 2654, Canal Zone District Court, Cristobal Division (not reported) and the motion of defendant for summary judgment was sustained. The question was carefully considered in the United States Court of Appeals for the District of Columbia Circuit in Manhattan-Bronx Postal Union et al v. John A. Gronouski, etc., No. 18882, decided July 29, 1965 (not reported) wherein it said:

> "If appellants disagreed with the Postmaster General's decision as to this aspect of personnel policy, and believed it to be contrary to the President's wishes, it is obvious to whom their complaint should have been directed. It was not to the judicial branch. Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of the Presidential policies by Presidential appointees."

See also the decisions involving attempted enforcement of claims for overtime arising allegedly under Executive Order 9240 (7 F.R. 7159). The courts held that they lack jurisdiction in these cases. Sweet v. B. F. Goodrich and Co., 69 F. Supp. 782; Crabb v. Welden Bros., 164 F. 2d 797 and McDaniel v. Brown and Root, 172 F. 2d 466. See also Farmer v. Philadelphia Electric Co., 215 F. Supp. 729; 329 F. 2d 3.

6.

This is not an unconsented suit against the United States but is an action to restrain Government officers from violating a statute. The plaintiffs are not asking that the Secretary nor the Governor nor the United States be made to do any affirmative act in this suit.

The Secretary is attempting to read into a clearly mandatory law directing something specific to be done that he can exercise his discretion where no discretion is given. If such conduct were to be permitted without court intervention the individual would be left to the uncontrolled and arbitrary action of a public administrative officer, whose action is unauthorized by law. See American School of Magnetic Healing v. McAnnulty, 187 U.S. 94.

Matters committed by law to agency discretion are generally not judicially reviewable as has been held by this court. Doyle v. Fleming, 219 F. Supp. 277. In the case at bar no discretion is conferred.

As set out in plaintiffs' brief:

> "Where a federal official attempts to perform an act which is in excess of his authority or under authority not validly conferred, equitable action will lie to restrain him without the sovereign being a party." Continental Bank & Trust Co. v. Woodall, 239 F. 2d 707; Lane v. Watts, 234 U.S. 525; The State of Colorado v. Toll, Supt. of the Rocky Mountain National

Park, 268 U.S. 228 (supra); Missouri v. Holland, 252 U.S. 416; Mine Safety Appliance Co. v. Forrestal, 326 U.S. 371; Philadelphia Co. v. Stimson, Secretary of War, 223 U.S. 605.

The ultimate effect of restraining the Secretary and the Governor-President from noncompliance with the statute may be the expenditure of funds from the United States Treasury in payment of the differential due the Canal Zone Government employees but that is not the question here. The only relief requested in this action is injunctive to restrain these officers from an arbitrary refusal to obey the law.

The question of the failure to consent by the United States of course is not raised nor could it be countenanced as between the two Panama Canal Company employees and Fleming as President of the Panama Canal Company. Suits against the Company are authorized under Title 2, C.Z.C. 65(3).

7.

The tropical (overseas) differential of 25 per cent has been paid to U. S. citizen employees in the Canal Zone since the Panama Canal Act (37 Stat. 560, 569) of August 1912 and has been regarded in many wage practices relating to the Canal Zone since that time as basic compensation.

In addition to Title 2, C.Z.C. 146 (supra), the section which fixes the 25 per cent differential, two other sections in the same Chapter 7 dealing with compensation of Canal Zone Government Employees and Panama Canal Company Employees prescribe the differential. The first, Section 101(2b), limits the Governor in prescribing compensation for the Canal Zone Government employees to "the compensation paid for the same or similar services to persons employed by the Government in the continental United States", and states that this compensation may not ex-

ceed their compensation by 25 per cent. The footnotes to this section of the Code state:

> "The authority contained in this section to appoint, remove and compensate employees of the Canal Zone Government has been substantially superseded by the Canal Zone Wage and Employment Practices Act of July 25, 1958 (section 141 et seq. of this title), referred to above, which established the Canal Zone Merit System, and which vests authority directly in the head of the agency. However, the provisions carried into this section are retained because they are necessary for application to the few employees of the Canal Zone Government who are excluded from the Canal Zone Merit System."

The second section is Section 144(d) dealing with "Compensation" and is under Subchapter III which treats of the "Wage and Employment Practices" that prevail as to all others except the few mentioned in the footnote to Section 101 above, and is as follows:

> "A *rate of basic* compensation established under this section may not exceed by more than 25 per cent, when increased by the amounts of the allowance and the differential authorized by Section 146 of this Title, the rate of basic compensation for the same or similar work performed in the continental United States." (Italics supplied).

Section 9 of Public Law 85-550 also describes the differential due U. S. citizen employees in the Canal Zone as basic compensation for certain purposes:

> "BENEFITS BASED ON COMPENSATION
>
> "Sec. 9. For the purposes of determining—
>
> (1) amounts of insurance under the Federal Employees' Group Life Insurance Act of 1954, as amended (5 U.S.C. 2091-2103),[44]

(2) amounts of compensation for death or disability under the Federal Employees' Compensation Act, as amended (5 U.S.C. 751 et seq.),[45]

(3) amounts of overtime pay or other premium compensation,

(4) benefits under the Civil Service Retirement Act, as amended (5 U.S.C. 2251-2267),[46]

(5) annual leave benefits, and

(6) any other benefits which are related to basic compensation, *the basic compensation* of each employee who is a citizen of the United States *shall include*—

(A) the rate of basic compensation for his position established in the manner provided by section 5 of this Act, and

(B) the amount of the allowance and *the differential* determined in the manner provided by section 7 of this Act." (Italics supplied).

Prior to the passage of the Revenue Act of 1950, P.L. 814, H.R. 8920, Section 220, the employees of the United States or any agency thereof in the Canal Zone were exempt from income tax. Beginning after December 31, 1949 "amounts paid for services performed" by these people became taxable, and the Department of Internal Revenue has always construed this language to include the 25 per cent differential and has collected the tax accordingly.

A certain basic compensation must be established before the differential can be computed. Obviously the differential cannot be a part of that basic compensation as it must be computed before 25 percent of it can be mathematically determined.

Also, the language of T. 2, C.Z.C., 146 (supra), which directs the payment of the differential, in stating in the

opening paragraph that the differential shall be paid "in addition to established basic compensation", creates the thought that it is additive and not basic.

It therefore can be said that for some purposes it is considered as basic compensation and for others it might be regarded as additive.

In view of the fact that the statute in question is as forceful and mandatory in directing that the differential be paid as the statutes providing for the basic compensation based upon "the same or similar work performed in the continental United States by employees of the Government of the United States", the differential must be considered as basic compensation and the general rules governing wage and employment practices in the Canal Zone under the statutes must be applied when a change is contemplated.

8.

Plaintiffs are entitled to injunctive relief under the terms of Title 5, C.Z.C., Section 322, which provide:

> "(a) An injunction may be granted when:
>
> (1) it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;" or
>
> "(6) the restraint is necessary to prevent a multiplicity of judicial proceedings;"

It is clear that plaintiffs are entitled to the "relief demanded" and that if the injunction is granted it will prevent literally hundreds of "judicial proceedings" for collection of amounts due as there are approximately 3500 Canal Zone Government and Panama Canal Company em-

ployees in the Canal Zone who are U. S. citizens and a great many are affected by the regulation.

The plaintiffs are not praying for the payment of monies in this action. They are requesting, however, that a Government officer and his subordinate be restrained from an arbitrary exercise of discretion where no discretion is authorized by law which has resulted and will continue to result in damage to the plaintiffs and for which there is no adequate remedy at law.

For these reasons and as above stated the prayer of the plaintiffs is granted, and it is held that the interim regulation of July 29, 1964 and the final regulation of October 10, 1964 are invalid. It is directed also that an order of injunction shall be prepared for the court's signature by counsel for the plaintiffs directing that the defendant, Robert J. Fleming, Jr., Governor of the Canal Zone and President of the Panama Canal Company forthwith be enjoined and restrained from implementing and enforcing the provisions of the regulation of the Secretary of the Army published on July 29, 1964 as an interim regulation freezing the 25 per cent differential and that he be enjoined and restrained from implementing and enforcing the provisions of the regulation superseding and terminating the interim regulation, which was issued and published by the Secretary on October 10, 1964 and contained in 29 Federal Register as 14024 and being Title 5, C.F.R. 1204.12 changing the overseas (tropical) differential of U. S. citizen employees in the Canal Zone, and that the order be served so that the defendant will be enjoined.

(Footnote to Part 1)

This ruling is made with full realization that there may be other maximum salary limitations imposed by law on U. S. employees. Such limitations have not been cited by counsel in their arguments and this opinion does not attempt to determine their effect on

Canal Zone employees. See 1964 Pay Act, P.L. 88-426, Sec. 102, 308; 5 C.F.R., Chap. II, 1204.12(d).

Dated this 9th day of November, 1965.

(Signed) GUTHRIE F. CROWE
Judge

Amended Decision

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE CANAL ZONE
BALBOA DIVISION

* * * * * * * * * *

The last paragraph on page 11 of Decision of Court beginning with the words, "The regulation is also in violation of the new law generally known as the Civil Rights Act . . ." and extending through two lines on page 12, terminating at the top of section 4 with the language ". . . only married women." is deleted.

This deletion is made because a subsequent reading of the Act reveals that the Canal Zone Government and the Panama Canal Company are exempted from the Equal Employment Opportunity provisions of Title VII of the Act referred to in Section 701(b) which relates that the term "employer" . . . "does not include (1) the United States, a corporation wholly owned by the Government of the United States . . ." and certain other agencies.
Dated this 10th day of November, 1965.

(Signed) GUTHRIE F. CROWE
Judge

* * * * * * * * * *

Declaratory Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE CANAL ZONE
BALBOA DIVISION

* * * * * * * * * *

This matter having come on before the court without a jury and without oral argument and the court having read and considered the pleadings, exhibits, memoranda and briefs, and evidence submitted on behalf of the respective parties and being of the opinion that the above-named plaintiffs are entitled to the declaratory relief demanded in the complaint filed herein on the 12th day of November, 1964:

It is ADJUDGED and DECLARED:

1. That an order of permanent injunction issue in the above entitled cause restraining and enjoining the defendant herein, ROBERT J. FLEMING, JR., Governor of the Canal Zone and President of the Panama Canal Company, his agents, servants, attorneys and employees, and each of them, to wholly desist and refrain from implementing and enforcing the provisions of the regulations of the Secretary of the Army published on July 29, 1964 as an interim regulation freezing the 25 per cent tropical (overseas) differential as said regulation pertains to the Canal Zone Government and the Panama Canal Company, and that Defendant FLEMING be enjoined and restrained from implementing and enforcing the provisions of the regulation of the Secretary of the Army superseding and terminating the interim regulation, which was issued and published by the Secretary of the Army on October 10, 1964, and contained in 29 Federal Register as 14024 and being Title 5, CODE OF FEDERAL REGULATIONS (C.F.R.) 1204.12 changing, altering and reducing the tropical (overseas) differential of United States citizen employees in the Canal Zone.

2. That the Secretary of the Army is not an indispensable party in this cause of action.

3. That this cause of action, as it pertains to the Governor of the Canal Zone, is not an unconsented suit against the United States Government.

4. That one of the party-plaintiffs, Canal Zone Central Labor Union and Metal Trades Council, AFL-CIO, does not possess standing to sue in this cause of action as a result of Executive Order 10988 (3 C.F.R., 1959-63 Comp., p. 521).

5. That under the provisions of Title 2, CANAL ZONE CODE, Section 146, it is mandatory that the tropical (overseas) differential shall be 25 per cent and not less than 25 per cent.

6. That each United States citizen employee of the Canal Zone Government and the Panama Canal Company must be paid a tropical (overseas) differential of 25 per cent regardless of their sex or marital status. The term "employee" here is as defined in Title 2, CANAL ZONE CODE, Section 141.

7. That the tropical (overseas) differential (Title 2, C.Z.C. 146) is basic compensation.

8. That the Secretary of the Army does not possess discretionary authority to alter or reduce the tropical (overseas) differential provided for in Title 2, CANAL ZONE CODE, Section 146.

9. That the injunctive relief sought by plaintiffs in this cause of action can be accomplished by the issuance of an order of permanent injunction addressed to Robert J. Fleming, Jr., as Governor of the Canal Zone and as President of the Panama Canal Company.

10. That the individual plaintiffs herein have a legal right based upon a statute to a tropical (overseas) differential and therefore possess standing to sue.

DATED: November 18, 1965.

(Signed) GUTHRIE F. CROWE
Guthrie F. Crowe
District Judge

• • • • • • • • • • •

Order of Permanent Injunction

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE CANAL ZONE
BALBOA DIVISION

• • • • • • • • • • •

To ROBERT J. FLEMING, JR., Governor of the Canal Zone and President of the Panama Canal Company, his agents, attorneys, clerks, servants, assigns, employees, and all claiming or holding under or through him,

GREETINGS:

Whereas, Paul W. Bramlett, Pauline F. Blaney, Albert F. Hanson, James J. O'Donnell, and Lydia M. Myers, as plaintiffs, heretofore filed complaint in the United States District Court for the District of the Canal Zone against you for certain relief as therein set forth, and has obtained judgment of a permanent injunction and a declaratory judgment as prayed for in said complaint;

Now, THEREFORE, having regard to the matters contained in said complaint and upon the pleadings and briefs filed, and upon the submission of the case without oral argument, as agreed by the parties, I Do HEREBY command and stirctly enjoin you, the said Governor of the Canal Zone and the President of the Panama Canal Company, your agents, servants, subordinates, attorneys and employees, and each of you, to WHOLLY DESIST AND REFRAIN from im-

plementing and enforcing the provisions of the regulation of the Secretary of the Army published on July 29, 1964, as an interim regulation freezing the 25 per cent overseas (tropical) differential as said regulation pertains to the Canal Zone Government and the Panama Canal Company, and that YOU be ENJOINED and RESTRAINED from implementing and enforcing the provisions of the regulation of the Secretary of the Army superseding and terminating the interim regulation, which was issued and published by the Secretary on October 10, 1964 and contained in 29 Federal Register as 14024 and being Title 5, Code of Federal Regulations (C.F.R.) 1204.12 changing, altering and reducing the overseas (tropical) differential of U.S. citizen employees in the Canal Zone, WHICH COMMANDS AND INJUNCTIONS YOU are required to observe and obey;

That the entry into force of this Order of Permanent Injunction shall be stayed for a period of thirty (30) days commencing with the date of this Order;

And hereof FAIL NOT UNDER PENALTY OF LAW THENCE ENSUING.

DATED: November 18, 1965

(Signed) GUTHRIE F. CROWE
Guthrie F. Crowe
District Judge

Approved as to form.

(Signed) ALBERT J. JOYCE, JR.
Albert J. Joyce, Jr.
Attorney for Plaintiffs

Approved as to form.

(Signed) ROWLAND K. HAZARD
Rowland K. Hazard
United States Attorney
Attorney for Defendant

Order Staying Injunction Pending Appeal

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE CANAL ZONE
BALBOA DIVISION

* * * * * * * * * *

This cause came on to be heard on motion of defendant Fleming, by his undersigned attorney, Rowland K. Hazard, United States Attorney for the District of the Canal Zone for an order staying the effective date of the injunction heretofore granted in this cause on November 18, 1965, until final disposition of appeal filed herein, and Rowland K. Hazard and Albert J. Joyce, Jr., appearing of counsel for the respective parties, and the Court being advised, and it appearing to the Court that there are substantial and important questions involved in this cause, that the defendants will be irreparably injured if a stay is not granted, that the granting of a stay will not substantially harm United States-citizen employees of the Canal Zone Government and Panama Canal Company, that the public interest requires that a stay be issued, and that Rule 62 of the Federal Rules of Civil Procedure clearly grants the power to stay the injunction in order to preserve the status quo,

It Is Ordered that the effective date of the injunction heretofore granted in this cause on November 18, 1965 be

and is hereby stayed until final disposition of the appeal herein.

(Signed) GUTHRIE F. CROWE
Guthrie F. Crowe
Judge

Dated: Dec. 10, 1965

Approved for Form:

(Signed) ROWLAND K. HAZARD
Rowland K. Hazard
United States Attorney
Attorney for Defendant

(Signed) ALBERT J. JOYCE, JR.
Albert J. Joyce, Jr.
Attorney for Plaintiffs

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H. Rep. No. 1869, 85th Cong., 2d Sess. 7

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 732

PAUL BRAMLETT, ET AL., PETITIONERS

v.

BRIGADIER GENERAL WALTER P. LEBER, GOVERNOR OF THE CANAL ZONE AND PRESIDENT OF THE PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, *sub nom. Leber* v. *Canal Zone Central Labor Union, et al.* (Pet. App. 14a), is not yet reported. The opinion of the United States District Court for the District of the Canal

Zone (Pet. App. 32a) is reported, *sub nom. Canal Zone Central Labor Union, etc.* v. *Fleming,* at 246 F. Supp. 998.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1967 (Pet. App. 31a). The petition for a writ of certiorari was filed on October 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under a statute which provides that, in addition to their basic compensation, American-citizen government employees in the Canal Zone shall be paid, in "such amounts as the head of the department concerned determines to be payable," an "overseas (tropical) differential not in excess of" 25 percent of their basic compensation and special tax allowance, the amount of the "tropical differential" payable may be fixed at less than the 25 percent figure.

2. Whether, by virtue of Section 142(b) of Title 2 of the Canal Zone Code, dependents of persons living in the Canal Zone were properly excluded from receiving the tropical differential in addition to their regular salaries.

3. Whether the Secretary of the Army, the official charged with responsibility for regulating the conditions of payment of the tropical differential, was a necessary party to this action.

STATUTES INVOLVED

Title 2 of the Canal Zone Code, 76A Stat. 6 *et seq.*, provides in pertinent part:

SECTION 142. *General rules governing wage and employment practices*

(a) The head of each department shall conduct the wage and employment practices in the Canal Zone of his department in accordance with the:

(1) principles established in item 1 of the Memorandum of Understandings set forth in section 1(b) of Public Law 85-550 (July 25, 1958, 72 Stat. 405);

(2) provisions of this subchapter;

(3) regulations promulgated by, or under the authority of, the President of the United States in accordance with this subchapter; and

(4) provisions of applicable law.

(b) To the extent he deems appropriate, the President may:

(1) exclude any employee of position from this subchapter or from any provision of this subchapter; * * *

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SECTION 146. *Additional allowance and differential*

In addition to established basic compensation, there shall be paid to each employee who is a citizen of the United States such amounts as the head of the department concerned determines to be payable, as follows:

(1) an allowance for taxes which operate to reduce his disposable income in comparison

with the disposable incomes of those employees who are not citizens of the United States; and

(2) an overseas (tropical) differential not in excess of an amount equal to 25 per cent of the aggregate amount of the rate of basic compensation so established and the amount of the allowance provided in accordance with paragraph (1) of this section.

SECTION 155. *Administration by President; regulations; delegation of authority*

(a) The President shall coordinate the policies and activities of the respective departments under this subchapter, and may promulgate regulations necessary and appropriate to carry out the provisions and accomplish the purposes of this subchapter.

(b) The President may delegate any authority vested in him by this subchapter, and may provide for the redelegation of any such authority.

STATEMENT

Petitioners, five individuals employed in the Panama Canal Zone by the Canal Zone Government or the government-owned Panama Canal Company, sued for a judgment declaring invalid, and an injunction against enforcing, certain regulations of the Secretary of the Army dealing with payment of the so-called "tropical differential."[1] That differential is an allowance payable under 2 C.Z. Code 146 to American citizens employed in the Canal Zone over and above

[1] The Canal Zone Code vests the President with authority over wage practices in the Canal Zone and authorizes him to delegate that authority. 2 C. Z. Code 155. As the court of appeals noted, that authority was duly delegated to the Secretary of the Army (see Pet. App. 16a).

the regular compensation provided for their government jobs. In substance, the challenged regulations reduced the amount of that extra allowance from 25 percent to 15 percent of their basic compensation and precluded payment of any differential to dependents of persons living in Panama and the Canal Zone.[2] Although petitioners named the Secretary of the Army as well as respondent as a party defendant in the suit, the Secretary was not served and did not appear in the action.

The District Court for the District of the Canal Zone concluded that "the only reasonable interpretation that can be put upon Section 146 * * * is that it is mandatory and that the differential shall be 25 percent but 'not in excess' of that sum * * *" (Pet. App. 37a), and, moreover, must be paid to all employees without exception. On this basis it granted the declaratory and injunctive relief sought by petitioners (Pet. App. 54a-57a), but stayed the effect of its decision pending final disposition of an appeal (Pet. App. 58a-59a).

The court of appeals reversed, holding unanimously that "the plain language" (Pet. App. 24a) of 2 C.Z. Code 146 and its statutory predecessors established that Congress intended to make the payment of the "tropi-

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[2] The pertinent regulations challenged in the instant action (Pet. App. 10a) now appear at 35 C.F.R. (1967 Rev.) 253.135. By virtue of a savings clause, persons in government employment in the Canal Zone when the regulations became effective continue to receive the dollar amount of any differential they were receiving at that time. However, they will receive no increase in that differential until, by virtue of promotions or pay raises, the amount of differential payments they receive falls below 15 percent of their basic compensation. As to dependents, however, the right to continue receiving any tropical differential expired two years after the Secretary's regulations became effective in 1964. See 35 C.F.R. (1967 Rev.) 235.135(b) and (c).

cal differential" a discretionary matter, and that other sections of the Canal Zone Code (2 C.Z. Code 142(b) and 155) authorized the President or his delegate to exclude any class of employees from receipt of that differential (Pet. App. 26a-27a).

By a divided vote, the Fifth Circuit also held that this suit could not be maintained because the Secretary of the Army, to whom the President has delegated authority to regulate differential allowances in the Canal Zone and whose regulations were being challenged by petitioners, was an indispensable party who had not been joined in the action (Pet. App. 19a-20a, 30a). Additionally, insofar as relief was sought against respondent as Governor of the Canal Zone, the court held that the suit was an unconsented action against the United States (Pet. App. 21a-22a).

DISCUSSION

The decision of the court of appeals is plainly correct on the merits and there is no conflict with decisions of other circuits or of this Court. Further review in this Court is therefore not warranted.

1. Simply stated, petitioners contend that Congress vested American citizens employed in the Canal Zone with a permanent right to receive salaries 25 percent higher than those paid government employees in the United States for similar work. As the carefully reasoned opinion of the court below makes clear, however, neither the language of the governing statute nor its legislative history supports that contention. Section 146 of Title 2 of the Canal Zone Code, upon which petitioners' rely, is not cast in mandatory terms. Rather, it provides only that "such amounts as the

head of the department concerned determines to be payable" shall be paid as "an overseas (tropical) differential" limited to a figure "not in excess of an amount equal to 25 per cent" of an employee's basic compensation. And, as the court of appeals' opinion also notes (Pet. App. 25a), the House committee which drafted Section 146 referred to the tropical differential authorized thereunder in discretionary terms as an allowance which "may be paid." H. Rep. No. 1869, 85th Cong., 2d Sess., p. 17 (1958). As the opinion below explains (Pet. App. 22a-25a), the language of Section 146 governing differential payments originated in an amendment from the floor of the House to the proposed Panama Canal Act of 1912 (37 Stat. 560) designed to place a ceiling on the payment of extra wages to government employees in the Panama Canal Zone.[3] Subsequent legislation pertaining to salary differentials payable in the Canal Zone retained the limiting language of the original enactment.[4] There is no evidence—and petitioners cite none—that Con-

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[3] See the remarks of Congressman Adamson at 48 Cong. Rec. 6768 (quoted in the Fifth Circuit's opinion, at Pet. App. 25a), explaining his amendment to the provisions of that 1912 legislation which then governed salary practices in the Canal Zone. His amendment, which was adopted (37 Stat. 561), provided that "salaries or compensation fixed hereunder by the President *shall in no instance exceed by more than twenty-five per centum* the salary or compensation paid for the same or similar services to persons employed by the Government in the continental United States" (emphasis supplied).

[4] See, e.g., 2 C.Z. Code (1934 ed.) 81(c); Act of July 9, 1937, Ch. 470, Sec. 3, 50 Stat. 487. Contrary to petitioners' contention (Pet. 15), the fact that the authority to set the tropical differential at a rate lower than the authorized maximum was not acted upon for a period of years hardly did away with that discretionary authority or converted the established ceiling into a fixed, mandatory figure.

gress ever expressed any intent to convert the 25 percent ceiling it placed on salary differentials payable in the Canal Zone into a permanent allowance to government employees fixed at that figure. Given the additional factor that parallel legislation providing hardship differentials for government employees at other posts around the world uniformly makes the appropriate level of differential discretionary with the President or his delegate,[5] the court of appeals did not err in refusing to read into 2 C.Z. Code 146 a congressional intent to establish a fixed differential for Canal Zone employees alone.[6] Had that been what Congress intended to do, it surely could have, and presumably would have, chosen more apt language.

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[5] See, *e.g.*, the Overseas Differentials and Allowances Act, 74 Stat. 792, as amended, 5 U.S.C. 5921, 5922 and 5925, and Section 207 of the Independent Offices Appropriations Act of 1949, 62 Stat. 194, now codified at 5 U.S.C. 5941, which authorize paying hardship differentials to government employees stationed in foreign areas or on American territory outside the continental United States in discretionary amounts which "may not exceed 25 percent of the rate of basic pay."

[6] There is no substance to the contention (Pet. 16) that it would be an unconstitutional delegation of legislative power to read 2 C.Z. Code 146 as giving the Secretary discretion to fix the level of the tropical differential because of that provision's "fail[ure] to prescribe [specific] standards" for the Secretary's guidance. The statute narrowly limits the range of that discretion to a sum not exceeding 25 percent of an employee's basic compensation. As the court of appeals noted (Pet. App. 29a), the allowance is fully understood to be used as a recruitment incentive. This Court has upheld, as not violative of the doctrine of delegated powers, congressional delegations of broader authority accompanied by a less strictly defined purpose. See, *e.g.*, *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 312; *Carlson* v. *Landon*, 342 U.S. 524, 542-544.

2. Neither is there merit to petitioners' contention that the Secretary exceeded his authority in precluding dependents of persons employed in Panama or in the Canal Zone from receiving the tropical differential. The Code expressly authorizes the President or his delegate "to the extent he deems appropriate" to "exclude any employee or position from this subchapter [governing, *inter alia,* payment of differentials] or any provision of this subchapter" (2 C.Z. Code 142(b) and 155). The Secretary's regulations have an entirely rational foundation which does not contravene the nondiscrimination policies of the government. Differential allowances are paid as "a recruitment and retention incentive" to induce American citizens to serve the government at hardship posts abroad (see, *e.g.,* 5 U.S.C. 5925). No incentives of this nature are necessary for persons already residing outside the United States for personal reasons other than their government employment. Dependent children and married women are normally abroad to be with their families; they suffer no additional hardship merely by taking government jobs for which they are fully compensated. Of course where circumstances negate that usual presumption, *e.g.,* where the wife is the principal family breadwinner or is separated from her husband, then the regulations provide for her to receive the tropical differential (35 C.F.R. (1967 Rev.) 253.135(b)(1)). Indeed, in addition to being wholly rational, the regulations in question do no more than extend to federal employees in the Canal Zone longstanding governmental policies governing eligibility for hardship allowances applied to all other govern-

ment employees stationed outside the continental United States.[7]

3. While, if the Court agrees with the foregoing analysis it need not reach the question, we think the court of appeals was equally correct in holding that this suit could not be maintained because the Secretary of the Army was an indispensable party not joined in the action.[8] Practical considerations determine when a party is indispensable. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 54. The test is whether the decree sought would "effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Williams* v. *Fanning*, 332 U.S. 490, 494. In the instant case, effective relief would require that the Secretary take action by directly exercising the power lodged in him by the President. Therefore, the case comes within the express language of *Williams* v. *Fanning*, to the effect that "the superior officer is an indispensable party if the decree granting the relief sought would require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" (332 U.S. at 493). Accord, *Ceballos* v. *Shaughnessy*, 352 U.S. 599; *Blackmar* v. *Guerre*, 342 U.S. 512.

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[7] See 5 C.F.R. (1964 Rev.) 591.303(c)(1) (Civil Service Commission Regulations governing allowances payable on American territory outside the continental United States); Department of State Standardized Regulations (Government Civilians Abroad) §§ 031.12, 031.13, 031.2 and 031.3 (governing foreign area employment); and 30 Dec. Comp. Gen. 337.

[8] The Secretary was not personally served in the District of the Canal Zone and could not be served by mail under 28 U.S.C. 1391(e), because that section does not apply to civil actions in the Canal Zone. See *Doyle* v. *Fleming*, 219 F. Supp. 277 (D.C.Z.).

Petitioners are attacking the Secretary's regulations which, by statute and presidential executive order, are binding upon respondent both in his capacity as Governor of the Canal Zone and as President of the Panama Canal Company. 2 C.Z. Code 142; Exec. Ord. No. 11171, 29 Fed. Reg. 11897. Thus, unless the Secretary is compelled to modify his present regulations, respondent is without authority to restore the former differential which the Secretary has cancelled. In order to give effective relief, the Secretary must take action authorizing payment of the former differential; simply enjoining respondent from implementing the new differential standards, as the court below noted, would not achieve petitioners' goal in this suit (see Pet. App. 18a-21a).

4. Finally, insofar as the suit was directed against respondent as Governor of the Canal Zone,[9] the court below properly characterized it as an unconsented action against the United States.[10] It has been settled by this Court that, absent an express waiver of sovereign immunity, a suit nominally against an officer of the United States may not be maintained if in reality it is an action against the government itself.[11] In determining when a suit is actually against the United

[9] The Canal Zone Government, as an independent agency of the United States (2 C.Z. Code 31), enjoys the immunity from suit of the United States. *Chournos* v. *United States*, 335 F. 2d 918 (C.A. 10); *cf. Blackmar* v. *Guerre*, 342 U.S. 512; *United States* v. *Remund*, 330 U.S. 539.

[10] Sovereign immunity would not bar an action against the Canal Company which is a "sue and be sued" corporation. See 2 C.Z. Code 65(a)(2), (3).

[11] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

States, "[t]he general rule is that the relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii* v. *Gordon,* 373 U.S. 57, 58. And a decree operates against the government "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with public administration,' *Land* v. *Dollar,* 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' *Larson* v. *Domestic & Foreign Corp.,* [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank,* 372 U.S. 609, 620. In short, the essential nature and effect of the proceeding, not the form of the action, determines the impact of the suit on the United States. *Mine Safety Co.* v. *Forrestal,* 326 U.S. 371, 374. Here petitioners are seeking recovery of millions of dollars in past and future salary differential payments. Plainly, if the relief prayed for were granted, they would expect the government and not respondent to provide these sums. Thus, as the Court stated in *Mine Safety Co.,* "the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensible party * * *" (326 U.S. at 375).[12]

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[12] That the Canal Zone Government is supported in large measure out of toll revenues from the Canal rather than out of general tax revenues does not change the fact that the relief which petitioners seek is against "money which the government owns." *Mine Safety Co.* v. *Forrestal, supra.* See *American Guaranty Corp.* v. *Burton,* 380 F. 2d 789, 791 (C.A. 1), squarely rejecting a contention identical to that made by petitioners (Pet. 14-16), *viz.,* that consent to sue the United States is unnecessary where recovery is sought out of public funds not raised as part of the general revenue.

Since the United States has not consented to be sued in the District Court for the District of the Canal Zone, the Fifth Circuit was correct in holding that court to have been without jurisdiction to entertain this action against respondent as Governor. *Wells* v. *United States*, 214 F. 2d 380 (C.A. 5), certiorari denied, 348 U.S. 855; cf. *Doyle* v. *Fleming, supra;* 28 U.S.C. 451; 28 U.S.C. 1346(a)(2).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE 1967—261912/P.O. 396